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**In The United States Court of Appeals
For the Ninth Circuit**

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN Co., a corporation,

Appellee.

FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

FILED
JAN 14 1949

PAUL P. O'BRIEN,

CLERK

J. DUANE VANCE,

BASSETT & GEISNESS,

Proctors for Appellant.

811 New World Life Building,
Seattle 4, Washington.

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In The United States Court of Appeals
For the Ninth Circuit

DALE MENELEE,	<i>Appellant,</i>	} No. 12124
vs.		
W. R. CHAMBERLIN Co., a corporation,	<i>Appellee.</i>	

FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, a seaman, filed a libel in personam against appellee, his employer, in the District Court for the Western District of Washington (Ap. 2) stating two causes of action: the first for compensatory damages for personal injuries alleged to be due to negligence of the appellee and the second for wages, maintenance and cure. The respondent answered (Ap. 7) admitting the ownership-operation of the vessel concerned and the employment of the libelant and denied the other allegations of the libelant's first cause of action and alleged two affirmative defenses hereto: (1) contributory negligence, and (2) that the injuries to the libelant, if any, were due to a freak wave; respondent's answer denied all material allegations of the libelant's second cause of action. The cause came regularly on for trial before the Hon-

orable John C. Bowen, District Judge of the United States District Court for the Western District of Washington, Northern Division, and upon the conclusion of said trial, the court rendered its oral opinion (Tr. 182) denying the libelant any recovery whatsoever and dismissing both causes of action and thereafter the court entered findings of fact and conclusions of law (Ap. 10) and decree (Ap. 13), accordingly.

Appellant thereafter duly prosecuted his appeal to this court.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 28 U.S.C.A., §41, which vests jurisdiction of all admiralty causes in the Federal District Court. Although the statutory provisions of the Jones Act, 46 U.S.C.A. 688, are applicable these may be enforced in an admiralty proceeding, *Baltimore SS. Co. v. Phillips*, 274 U.S. 316, 71 L. ed. 1069; *Panama Ry. v. Johnson*, 26 U.S. 375, 68 L. ed. 748; *Rogosich v. Union Dry Dock & Repair Co.*, 67 Fed. (2) 377.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of this court is granted by the provisions of Title 28 U.S.C.A., §225, which gives to the Circuit Courts of Appeal the jurisdiction of all appeals from final decrees of District Courts. This section has been in substance re-enacted in the new codification of the judicial code effective September 1, 1948, Title 28 U.S.C.A., § 1291.

STATEMENT OF THE CASE

As will be shown hereinafter, appellant has waived and now waives all matters pertaining to his second cause of action, except the right to claim the sum of \$35.31, which the appellee withheld from the appellant's wages to pay for the cost of subsistence of appellant in Capetown, South Africa (Libelant's Ex. 1).

Appellant's principal concern, therefore, is with the first cause of action for compensatory damages for personal injuries suffered.

There is no material conflict in the evidence. Four witnesses: the appellant himself, Englund, Jacobsen and Mydske (also seamen aboard the vessel) testified on behalf of the appellant (Tr. 5, 68, 79, 85) and Kloppenstein, the First Mate, testified for the appellee (Tr. 98).

Appellee had three other witnesses (Tr. 140, 154, 171) whose testimony went either to the degree of injury or the circumstances surrounding the wage claims contained in appellant's second cause of action.

We will set forth first the matters pertaining to appellant's claim for compensatory damages for personal injury. The charging portion of the libel relative to this matter was contained in Paragraph II thereof (Ap. 2) wherein it was stated:

"On or about January 23, 1947, during the course of said employment, while said vessel was in the North Pacific Ocean en route from the United States to Japan, libelant and other crew members were

ordered by the Chief Mate of said ship to stow below decks a hawser that was situated on the fan tail of said ship. The reason said order was given was that said vessel was exposed to heavy seas, and unless said hawser were stowed below deck, there was danger that it would be washed over the stern and foul the propeller. At said time said hawser was on the fan-tail of said vessel because the officers of said vessel had carelessly and negligently failed to have said hawser stowed below deck before said vessel encountered heavy seas."

The evidence submitted by *both* parties to the action substantially bears out every word of that charge.

Appellant signed on the SS ROBERT PARROTT about the 20th day of December, 1946 (Tr. 6) as an ordinary seaman at Olympia, Washington. The vessel sailed from Olympia, Washington, for Yokohama, Japan, on or about January 1, 1947 (Tr. 100, 142).

Before sailing from Olympia, a new 8-inch hawser was put aboard the vessel (Tr. 7, 69, 86). This hawser came in a bundle about four feet across, two feet deep (Tr. 7) constituting about 250 feet of line (Tr. 80). It would take almost the entire deck gang to move it (Tr. 7, 86).

Just before sailing the crew got orders to stow all hawsers, gear and equipment for safety at sea (Tr. 8). They had stowed the four forward hawsers in the forepeak (Tr. 87) and the four aft hawsers in No. 5 hatch or the steering engine room (Tr. 9) when Chief Mate Kloppenstein came out and instructed

the men to leave this new hawser on the fantail of the vessel (Tr. 8, 9).

The reason for leaving that hawser on deck at that particular time was to give the boatswain and carpenter an opportunity to put an eye in the hawser which the boatswain was ordered to do (Tr. 123) and which he subsequently did when the vessel was about ten days out of Seattle (Tr. 70). Respondent's only witness to the facts of the accident, John S. Kloppenstein, the chief mate of the vessel, who has been going to sea off and on since the first World War (Tr. 99) and who has been a licensed officer for eight years (Tr. 99) testified as follows:

"Question: Isn't it a fact that usually the hawser is stowed below?

Answer: Stored into a locker in the steering engine room." (Tr. 126)

In connection with events about to be recited, it is important to remember that the accident took place on the 22nd or 23rd of January, 1947, some 22 or 23 days out of Seattle.

The Chief Mate Kloppenstein testified as follows (Tr. 123):

"Question: Was this hawser made fast to anything before sailing from Seattle?

Answer: The hawser, before the ship left Seattle, was still in the coil and the coil was lashed fast.

Question: Afterwards, it was taken out of the coil?

Answer: Taken out of the coil for the purpose of splicing an eye.

Question: You ordered the Boatswain to splice that eye?

Answer: Yes.

Question: What did you tell him to do with it after?

Answer: To put it in the deck house.

Question: He didn't put it in the deck house?

Answer: No.

Question: Where did he put it?

Answer: He put it on the rack aft where the hawser had been stowed before."

The only testimony relative to the time in which said operation was completed was that of the witness Englund who testified that the eye was put in the hawser ten days out of Seattle (Tr. 70) and that of the chief mate who did not remember exactly when except that it was before the water started washing the decks of the vessel (Tr. 126):

"Question: If the boatswain had done what you told him, this probably would not have happened?

Answer: I told him to put it in the 'midship deck house and this probably would not—

Question: have arisen? Answer: Yes.

Question: You told the boatswain to do it?

Answer: Yes, but he did not do it.

Question: When did the boatswain get the eye complete in that hawser, do you know?

Answer: I don't recall, but it was before the water started washing the decks."

The vessel started running into heavy weather shortly after leaving Seattle, estimated by the various witnesses, as follows:

- (1) Libelant: two or three days out (Tr. 11).
- (2) Jacobsen: seven or eight days out (Tr. 81).
- (3) Mydske: five to ten days (Tr. 88).
- (4) Kloppenstein: "Possibly a week out—it was moderately heavy weather—not severe—usual heavy seas." (Tr. 100-101)

The whole situation as to the weather was probably best described by the witness Englund (Tr. 70) in the following questions and answers:

"Question: How rough was it; just describe—if you would rather do it this way, Mr. Englund, just describe the general nature of the weather from the time you left Seattle up to the time of this accident.

Answer: When we got outside here on the Sound and out at sea it started to get a little rough. As we went along it just seemed to get rougher. The wind got stronger and the seas started to get bigger.

Question: Do I understand you then to say that it just kept getting progressively worse as you went on?

Answer: Yes."

The witness Mydske said: "Well, it stayed pretty rough all the way * * * Well, it increased quite a bit up to that day of the accident. It was increasing kind of steadily.' (Tr. 88).

The witness Kloppenstein's testimony is substantially the same (Tr. 100-101).

Such conditions are to be expected at this time of the year in that area because, as stated in "American Practical Navigator" by Bowditch, 1943, page 270:

"Thus, in January the Icelandic and the

Aleutian minima intensifies to a depth of about 29.50 inches while in July the minima fill up and are almost obliterated. *This characteristic is associated with the gales which are frequent and violent over the higher northern latitudes in winter time and comparatively rare in summer.*" (Emphasis supplied)

The hawser was lashed to the bulwark with manila line (Tr. 10) and every so often additional lashings were fastened thereon (Tr. 11). Some four or five days prior to the accident the ship started shipping water over the stern (Tr. 72) and as the weather was getting worse the captain and chief mate made a tour of the vessel to inspect (Tr. 104) and it was decided to take the hawser into the deck house because if it became adrift it might get into the screw and disable the vessel (Tr. 102).

The libelant was on the 8 to 12 watch and had gone off duty at noon the day of the accident. At one o'clock the chief mate and the boatswain, Joe Davis, "turned to" the 8 to 12 watch to assist the two men of the 12 to 4 watch who could be spared from their duties to attempt to take this hawser into the deck house. The men proceeded aft into the gun crew's quarters and waited for an opportunity to go out and bring the hawser in (Tr. 16). They waited until a wave came over, and receded and then went out (Tr. 16). Apparently, the first mate, the boatswain Davis, and the appellant Menefee were the first ones out (Tr. 17). Subsequent events are best described in the words of the appellant (Tr. 17):

"Question: How long were you on deck before the wave came over?

Answer: We just got out and—I don't suppose over 7 or 8 seconds. We just got out there when a wave came right on over and knocked us all down.

Question: When the wave knocked you down, what did you strike?

Answer: I had hold of one of the lines tied to the mooring line. The wave knocked me down on the deck on my stomach, and somehow I turned around and I flew up,—when the wave went back. There were three different objects that tub. Then I came down on the deck again on my back. There were three different objects that came down on top of me. What they were I don't know."

The men all got safely back into the gun crew's quarters and the line was subsequently secured into the gun crew's quarters by the seaman Mydske (Tr. 89, 90, 91).

The appellant laid on some old ropes in the gun crew's quarters, his leg was black and blue and there were two welts across his back. He was practically unconscious (Tr. 18). At about 4:30 P.M. the crew managed to make it back to the 'midship house (Tr. 18), the appellant being carried by two other men (Tr. 18, 74, 84, 92).

Thereafter, the appellant stayed in his bunk until the ship arrived at Yokohama approximately a week later (Tr. 19) where he saw an Army doctor who told him that he had several broken arteries in his leg and back and was bleeding inside (Tr. 19).

During the middle of February, while the vessel

was between Saipan and Hong Kong, the appellant started standing his wheel watch only (Tr. 23, 24). He did no other work than stand the wheel watch (Tr. 24).

The chief mate kept the appellant on light work for the rest of the time he was on the vessel, that is to say, until he left the vessel at Yokohama on July 2, 1947 (Tr. 109) some 5 months after his injury.

Appellant arrived in the United States on August 3, 1947, and at that time his back bothered him and when he did any walking his leg swelled up and turned black and blue (Tr. 25). He got a job working on the railroad around the first of October, 1947, and worked approximately six days but had to quit because his leg swelled up and turned black and blue (Tr. 26, 27). In July of 1948 he tried to work for his brother at Livingston, Montana, on the ranch running a tractor and stacking hay but was forced to quit because the work was too heavy for his injured back (Tr. 27).

Appellant has never suffered any injury or major illness prior to this injury (Tr. 27). He is 37 years of age (Tr. 39) and his principal employment has been farming (Tr. 5). He was raised in an orphanage and got schooling equivalent to approximately the fourth grade (Tr. 5, 6). He had sailed at sea about 19 months prior to his injury (Tr. 4).

The appellant has been affected with nervousness all his life (Tr. 67) and it is clear from a study of the testimony that the shock to his nervous system

because of this experience and his injuries has been considerable.

The appellant has waived all of his second cause of action except for the sum of \$35.31, and the facts pertaining thereto are relatively simple and are undisputed.

On July 2, 1947, in Capetown, South Africa, the appellant, while ashore, picked up a girl and went with her in a taxicab. The girl and the taxicab driver held him up and abandoned him (Tr. 53). As a result, he missed his vessel. The American Consul had the appellant placed in jail where he stayed for 12 days (Tr. 33) until he was repatriated by the Consul to the United States aboard the SS ROBIN GOODFELLOW as an ordinary seaman (Tr. 56). The sum of \$35.31 was paid by appellee for appellant's subsistence in the jail for those 12 days and appellee deducted this sum from appellant's wages (Libelant's Ex. 1). It is this sum appellant seeks on his second cause of action. He foregoes all other claims in connection therewith.

At the conclusion of the trial the court rendered its oral decision, the pertinent portions of which are as follows:

"The immediate cause, the proximate and sole actual cause of the accident and resulting injuries complained of by libelant was a hazard of the sea in the form of that sea wave, forced across the deck and striking this libelant. Such cause of the injury was not any negligence that was an active negligent condition produced by the act or omissions of the respondent. For those reasons the court is convinced by a preponderance of the evidence that as to the first cause of action

for negligent injury and damages, the libelant should take nothing by such first cause of action.” (Tr. 182, 183)

Relative to that portion of the second cause of action now claimed by appellant the court said:

“And it seems to the court reasonable that the respondent should have asked this libelant to reimburse the respondent for that \$35.00 and that libelant’s refusal to accept the statement of account between him and the respondent should not result in any penalty to the respondent.” (Tr. 184)

Thereafter the court entered its findings of fact, conclusions of law and decree, dismissing both libelant’s causes of action (Tr. 10, 13).

SPECIFICATION OF ERRORS

The appellant specifies as errors the following:

(1) The court erred in finding that the injuries sustained by appellant were not due to any negligence on the part of the appellee but were due to perils and hazards of the sea.

(2) The court erred in failing to find that appellee and/or its employees other than appellant were negligent in failing to have the hawser on the fantail properly stowed and that said negligence proximately caused or contributed to appellant’s injuries.

(3) The court erred in failing to find that the appellee unlawfully withheld from the appellant sums of money paid by appellee for the retention of appellant in jail at Capetown, South Africa.

(4) The court erred in dismissing appellant’s first cause of action.

(5) The court erred in dismissing appellant's second cause of action.

All the above specifications are to be found in the appellant's assignment of errors at page 16 of the Apostles.

ARGUMENT

I.

There Being No Conflict in the Evidence on Material Matters the Trial Court's Decision on Negligence and Proximate Cause Is Entitled to No More Weight Than It's Ruling on Any Other Question of Law.

Mahnich v. Southern SS. Co., 321 U.S. 96, 88 L. ed. 561;

Krey v. U.S. (2CCA) 123 F.(2d) 1008, 1010;

Barbarino v. Stanhope SS. Co. (2CCA) 1945, A.M.C. 1409, 151 F.(2d) 553;

Kreste v. U.S. (2CCA) 1947 A.M.C. 581, 583, 158 F.(2d) 575;

Guerrini v. U.S. (2CCA) 1948 A.M.C. 724, 167 F.(2d) 352;

Campana Corp. v. Harrison (7CCA) 114 F.(2d) 400;

Himmel Bros. Co. v. Serrich Corp. (7CCA) 122 F.(2d) 740;

Murray v. Noblesville Milling Co. (7CCA) 131 F.(2d) 470;

Kuhn v. Princess, etc. (3CCA) 119 F.(2d) 704;

United States v. Mitchell (8CCA) 104 F. (2d) 343;

United States v. South Georgia Ry. Co.
(5CCA 107 F.(2d) 3;

Westland v. Post Land Co., 115 Wash. 329.

The decisions of the Second Circuit Court of Appeals in series as presented eminently develop and explain the rule and the reasons therefor.

In the first of those cases, *Krey v. U.S.* (CCA2) 123 F.(2d) 1008, at page 1010, the court said:

“The question, then, is solely whether or not the shower was unseaworthy. Normally this would raise only a question of fact, as to which we are accustomed to defer to the rulings below as made upon conflicting evidence. The I.L.I. No. 103, Second Circuit, 104 F.(2d) 650. But the facts here are not in dispute, and the question is therefore not whom to believe, but whether the shower as admittedly constructed was unseaworthy. It is our conclusion that it was.”

In that case the judgment of the trial court that the shower was seaworthy was reversed.

In the next case, that of *Barbarino v. Stanhope SS. Co.*, 1945 AMC 1409, 151 F.(2d) 553, Judge Learned Hand discussed the subject at page 1412 of 1945 AMC, wherein he said:

“Coming then to the merits, the question is whether the stevedore was negligent, either for not keeping the boom over the ‘crutch’, when the loop of the ‘preventer guy’ was being rigged; or for not telling Barbarino to get out of the way when the boom was to be raised. Although, as we have said, the judge made no findings on either point, he did discuss the first in his opinion and expressly ruled that, considering the delay which it would have entailed to keep the

boom over the 'crutch' and the slight chance that the boom would fall, it was not negligent to expose the workmen to the risk.

"He does not, however, appear to have passed upon the second point at all, and even if he had, his finding, like that upon the first, would not have been a 'finding of fact' which we must accept unless 'clearly erroneous.' It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is as conclusive upon it as it is upon any other question; for a jury is deemed—rightly or wrongly—to be as well qualified to set such a standard as a judge. But when the decision is that of a judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law', strictly so called. *The W. C. Patterson*, 1934 A.M.C. 812, 70 F.(2d) 712 (2CCA); *Ford Motor Co. v. Manhattan Lighterage Corp.*, 1938 A.M.C. 879; 97 F.(2d) 577 (2CCA); *The Ira S. Bushey, Inc.*, 1941 A.M.C. 1135, 120 F.(2d) 1010 (2CCA).

"That this is right appears when we consider that to fix any standard of care two conflicting interests must be always appraised and balanced: that of the person to be protected, and that of the person whose activity must be curtailed. It is true that the interest of the person to be protected must also be discounted by the improbability that it will be invaded, and that that involves only a question of fact; nevertheless, in the end no decision can be reached except by choosing between two human interests, one of which must be sacrificed. *Such choices are the very stuff of law, and as to them appellate courts*

have no reason to defer to the decisions of courts of first instance." (Emphasis supplied)

In the next case, *Kreste v. U.S.*, 1947 A.M.C. 581, 583, 158 Fed.(2d) 575, decision by Judge Frank, this rule was sustained: See page 583, 584, wherein it was said that a rule as to contributory negligence is a conclusion of law, not a finding of fact. In that case the trial court having found the libelant guilty of contributory negligence without entering its specific findings as to whether certain things did or did not occur, the Circuit Court remanded the case to the trial court for additional findings.

. In the case of *Guerrini v. U. S.* (CCA2) 1948 A.M.C. 724, 167 Fed.(2d) 352, decision by Judge Learned Hand, the *Kreste* case was followed and the case was remanded to the trial court for additional findings.

The evidence in the case at bar being not in conflict there would appear to be no reason for remanding for further findings but the ruling of the trial court should be freely reviewable as in the *Krey* and *Barbarino* cases, *supra*.

In *Mahnich v. Southern SS. Co.*, 321 U.S. 96, 88 L. ed. 561, the Supreme Court reversed the decisions of both the Circuit Court of Appeals and the District Court below on a ruling as to seaworthiness. In determining to review the findings of seaworthiness the court said (omitting citations) at 88 L.ed. 564:

"A finding of seaworthiness is usually a finding of fact. Ordinarily we do not, in admiralty, more than in other cases review the concurrent findings of fact of two courts below. Here, how-

ever, both courts below, holding themselves bound by the *Penar Del Rio*, 277 U.S. 151, 72 L.ed. 827, supra, and, on the facts found, held as a matter of law that the staging was seaworthy despite its defect. That conclusion of law is reviewable here."

The Washington case of *Westland v. Post Land Company*, 115 Wash. 329, is cited for the reasoning therein contained. There the court said:

"This case does not fairly come within the settled rule of this court that we will not overturn the findings of the trial court, based upon facts, unless the same appear to us to be clearly against the preponderance of the evidence. That rule is based upon the theory that there is a conflict in the testimony, and that the trial court, having the witnesses before it, is in a better position than we to arrive at the truth. But here practically all of the facts are undisputed and it is not a question of the credibility of the witnesses or of the weight to be given their testimony. The sole question here is, what is the proper conclusion to be drawn from the practically undisputed evidence. Under these circumstances, the law imposes upon us the duty of deciding for ourselves the proper conclusion to be drawn."

In *Murray v. Noblesville Milling Co.*, 131 F.(2d) 470, the Seventh Circuit said:

"To be sure where the finding of fact is supported by evidence and is not clearly erroneous, it must be accepted by us, but the rule does not operate to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings and we are free to draw the ultimate inferences and conclusions which the find-

ings reasonably induce, and *where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review.* *Kuhn v. Princess etc.*, 119 Fed.(2d) 704." (Emphasis supplied)

The Third, Fifth and Eighth Circuits are in accord.

U.S. v. Southern Georgia Ry. Co. (5CCA) 107 F.(2d) 3;

U. S. v. Mitchell (8CCA) 104 F.(2d) 343;

Kuhn v. Princess, etc. (3CAA) F.(2d) 704;

See also:

Himmel Bros. Co v. Serrich Corp. (7CCA) 122 F.(2d) 740;

Campana Corp. v. Harrison (7CCA) 114 (F.(2d) 400.

One of the fundamental principles of the common law is the principle of *stare decisis*. Under that principle it is the duty of appellate courts to assure uniformity of holdings within and amongst their subordinate tribunals. "The rule '*Stare Decisis*' has for its object the salutary effect of uniformity, certainty, and stability in the law." 14 Am. Jur., Courts §60.

Thus it is clear that in cases where facts are similar it is the duty of the appellate court to see that uniform results and holdings are reached in all subordinate tribunals under its supervision. This result could not be reached if appellate courts were to defer to the rulings of trial courts on cases where the facts are undisputed. One result might be reached in one district and another result in another district. Indeed, it is even conceivable that under such circumstances there would be a divergency of result in a

particular district without adequate recourse to the litigant to protect his right to uniform justice.

No one, of course, doubts that the visual inspection of a witness is important in determining the truth of his testimony and consequently when there is a conflict in the testimony of the different witnesses appellate courts very properly defer to the findings of the trial court. Given, however, the absence of the reason for the rule, the rule itself should be inapplicable.

Determining the facts from conflicting evidence is peculiarly a function of the trier of the facts; applying the law to a given set of facts is peculiarly a judicial function, and as Judge Learned Hand said is "the very stuff of law and as to them appellate courts have no reason to defer to the decisions of courts of the first instance". (*Barbarino v. Stanhope SS Co., Supra*).

II.

The Trial Court Erred in Not Holding That the Appellee Was Guilty of Negligence Proximately Contributing to Appellant's Injuries.

This argument is addressed to assignments of error (1), (2) and (4), which are as follows:

(1) The court erred in finding that the injuries sustained by appellant were not due to any negligence on the part of the appellee but were due to perils and hazard of the sea.

(2) The court erred in failing to find that appellee and/or its employees other than appellant were negligent in failing to have the hawser on the fantail prop-

erly stowed and that said negligence proximately caused or contributed to appellant's injuries.

(4) The court erred in dismissing appellant's first cause of action.

In order to rebut the trial courts conclusion that the sole cause of appellant's injuries was the huge wave, appellant must establish that there was negligence on the part of appellee and that such negligence proximately contributed to his injury. Appellant accepts that burden.

It is not necessary, of course, that the negligence of the appellee be the *sole* cause of the appellant's injuries to justify recovery, 45 U.S.C.A. Section 51. The Jones Act, 45 U.S.C.A. Section 688, applies to seamen the laws applicable to railway employees. That law, 45 U.S.C.A. 51, provides:

"Every common carrier * * * shall be liable in damages to any person suffering injury * * * *resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *.*" (Emphasis supplied)

See also: *Miller v. U.P. Railway*, 290 U.S. 233, 78 L.ed. 285, 290 (citing inter alia *Pacific Tel. & Tel. v. Hoffman*, CCA 9, 208 Fed. 221); *Hern v. Moran Towing and Transport Co.*, 138 Fed.(2d) 900; *Rey v. Colonial Navigation Co.*, 138 Fed.(2d) 90.

The undisputed facts establishing the negligence of the appellee are these:

(1) It is the custom to stow all hawsers, those aft being usually stowed in the steering engine room (Tr. 126).

(2) The chief mate ordered the boatswain to

stow the hawser after putting in the eye and he failed to do so (Tr. 123) although there was plenty of time because the eye was put in before the water started washing the decks (Tr. 127) and the only witness who fixed the time thought it was put in ten days out of Seattle, which would be some 13 days prior to the accident (Tr. 70).

(3) The boatswain failed to obey the order to stow the hawser (Tr. 123) and the first mate who had ordered the hawser stowed obviously failed to check and see that his order was complied with although all other hawsers had been stowed at the time of sailing for the sake of safety of the vessel at sea (Tr. 7, 8).

(4) The captain and the first mate made an inspection to determine the safety of the vessel on the day of the accident (Tr. 104) and the situation that appeared to them at that time as regards the hawser was apparent at all times during the voyage.

(5) The hawser in its position on the fantail constituted a great menace to navigation in that if it became loose it would endanger fouling up the propeller and rendering the vessel completely helpless (Tr. 102).

(6) Storms of this nature are to be expected during this season in the North Pacific. From the steadiness of the storm and its constant increase, it is clear that this was a gale and not a storm of cyclonic nature.

It is said in "American Practical Navigator" by Bowditch, 1943, page 270, (Of which this court will take judicial notice, *Atlantic Transport Co. v. Rosenberg Bros. & Co.* 34 Fed.(2d) 843):

“In either hemisphere, moreover, the pressure over the land during the winter season is decidedly above the annual average, during the summer season decidedly below it; the extreme variations occurring in the case of continental Asia, where the mean monthly pressure ranges from about 30.50 inches during January to about 29.50 inches during July. Over the northern ocean, on the other hand, conditions are reversed, the summer pressures being somewhat higher. Thus, in January the Icelandic and the Aleutian Islands minima intensify to a depth of about 29.50 inches, while in July these minima fill up and are almost obliterated. *This characteristic is associated with the gales which are frequently and violent over the higher northern latitudes in winter time and comparatively rare in summer.*” (Emphasis supplied)

Furthermore, the heavy weather began about a week out of Seattle, according to the consensus of the witnesses, and constantly increased in intensity for the next 16 days until the day of the accident. During the greater portion of that time there was no water coming over the stern of the ship and it appears that good seamanship and ordinary prudence would have required that the hawser be moved during that time.

What are the facts that establish that the negligence of appellant proximately contributed to the appellant's injuries? It is undisputed that the sole purpose of the seamen being in the position they were at the time the injury was sustained was to stow this hawser which the boatswain had been previously instructed to do. It cannot, therefore, be denied, to use the well-worn legal language, that ‘but for’ the negligent

failure of the boatswain to so stow the hawser and the negligent failure of the officers of the vessel to see that those orders were promptly executed, these men would not have been exposed to the hazards that resulted in the injury to the appellant. The negligence of the respondent's officers and employees, therefore, concurred with the existence of an expectable gale to cause the appellant's injuries.

A case very similar to that at bar is the *William A. McKenney*, 41 Fed.(2d) 754. In that case a ship encountered a storm as here. One of the grounds of negligence alleged was that the hatch cover on No. 3 hatch was not properly secured with the result that a storm washed the hatch cover off creating, as here, an emergency situation. The facts are described by the court at page 757, as follows:

“About 1:15 o'clock A.M. on August 9th a heavy sea broke over the deck shifting the deck load forward and carrying away the foremast, breaking the cargo boom and at the same time the sea washed open No. 3 hatch. At 1:30 o'clock A.M. during a temporary lull all hands were called to cover this hatch and while they were at this work a heavy sea which petitioner's witnesses likened to a 'wall of water' came aboard amidships carrying away 14 of the men who had worked on the hatch.”

It was there argued that the negligence in failing to secure the hatch cover, if any, could not be the proximate cause of the injury. Of this the court said at page 758:

“The negligence consists in not exercising the requisite degree of care in driving the wedges

into the dogs holding the batten and in passing the ends of the hatch bars. The petitioners here insist that if there was negligence in this respect it was not the proximate cause of the injury; in other words, that between the cause and the disastrous result there was the intervention of an act of God or vis major which could not have been anticipated. With this contention I am unable to agree. The negligent failure created a situation which according to the petitioner's own witnesses was one of extreme emergency calling for prompt action and the 20 men who responded to the call were put into an extremely perilous situation, even under circumstances that could reasonably have been anticipated. While it may be that a wave as great as the one which swept down upon the deck of the vessel at about 1:30 o'clock A.M. could not reasonably have been anticipated yet the storm had assumed such proportions that it is reasonable to suppose that at any moment a heavy sea might break over the vessel with sufficient force to sweep the men before it. This, in my opinion, required that extraordinary precautions be taken to avoid disaster and no such precautions were taken. In my opinion a causal connection between the negligence and the ensuing loss of life has been established and the deaths of the men who were swept overboard must be attributed directly to this negligent failure of the respondent's officers to exercise that degree of reasonable care which the law requires."

A second case very similar to that at bar is *Ludwig v. U.S.*, 74 Fed. Supp. 29. In that case the court found that some barrels were insecurely lashed on the deck. A storm arose and the barrels became a menace to the

ship and seamen were sent out in that storm to further secure the drums and the libelant was injured by a sea breaking over the deck, much as in the case at bar. Because of the great similarity between that case and this one we set out in some detail the language of the court:

“On the question of liability, it is the finding, conclusion and decision of the court that the oil drums in question were negligently stowed by respondent on the deck of this vessel in that they were improperly and unseaworthily secured by the unsuitable kind of rope that was used, and in that respondent further negligently failed to use a proper, safe, careful and seaworthy method of securely tying these drums down with steel wire rope or chains fastened to the deck or hatchcoaming in a way that would have reasonably provided against alternate slacking and tightening of the tying-down means. Thereby, if such safer means had been used, the injury sustained by libelant in this case might reasonably have been avoided. Such negligence was a proximate cause of libelant’s injuries.

The situation here is different from that occurring in some of the cases where there was no negligence present except that which was involved in an alleged failure to foresee the onrush of a sea wave or the force of heavy seas coming aboard. In some of those cases that was the only negligence aspect of the case. *Here we have not only heavy seas and the impact of a heavy wave coming aboard but we also have this negligent stowage condition which in proximate effect continues up until the time when the heavy seas came aboard. That negligent stowage condition never did cease to exist, and I do not believe—*

notwithstanding the testimony of at least one witness who said this was a freak wave—that an ordinary, careful navigator would have been taken unawares on a voyage in these waters from Houston to Sydney respecting the kind of wave that came onto those decks that day when the libelant was necessarily carrying out the orders of a superior in trying to reattach and overcome the continuing negligent condition that these drums had been put in by the oversight and improper stowage of the ship owner and respondent in this case.

I do not believe the wave which came onto the main deck when libelant was hurt was a freak wave. There was testimony that on one or two previous occasions a wave 20 to 23 feet high had come onto not only the main deck but the boat deck. Libelant testified that before he got hurt it had been necessary to unship the number 4 lifeboat which was about on a level with the boat deck, and to pour out of the water which had accumulated in it from heavy seas smashing into it. So it seems previously there had been some heavy seas worse than or comparable to this one. While I do not place liability upon foreseeability of that heavy sea that came aboard here at the particular time when libelant was injured, yet I do not feel that the evidence as to its being an unusual and freak wave, so as to have been an act of God instead of a foreseeable condition of navigation, was such as to entitle respondent to exemption from liability on that ground.” (Emphasis supplied)

That case was decided by the very Judge who decided the case at bar. If there is any distinction between that case and the present one, it seems to be a

distinction without a difference. In one respect the case at bar is even a stronger case than the *Ludwig* case for in the *Ludwig* case it is apparent that the stowage in the first instance of the drums on deck was appropriate for it is common to carry all types of cargo on deck. The only negligence was in the manner of securing the drums whereas in the case at bar it is apparent that there was no necessity in having the hawser on deck at the time of the accident and it also was insufficiently secured for storm conditions. In both cases the plea of a freak wave was made but not established.

Of Course, if a storm at sea causes injury to a seamen without negligence or unseaworthiness, he cannot recover, but it has always been held that where the negligence of the officers or other seamen concurs with a storm or contributes to the injury of a crew member, the mere existence of the storm does not excuse the shipowner from liability.

In *Brislin v. U.S.*, 165 Fed. (2d) 296, (4th CCA) a seaman was injured when a radio fell on his head in a storm. The court found that the set screws holding the radio up either were defective or there was a negligent failure to tighten same. The trial court dismissed the libel on the ground that the storm was the sole cause of the libelant's injuries and the Fourth Circuit Court of Appeals reversed.

In *Carroll v. U.S.* 133 Fed.(2d) 690 (2CCA) when a ship encountered a storm the cook took a coffee pot off the stove and set it on the floor of the galley. As a steward entered the galley, the coffee pot slid over,

struck his foot, tipped over and burned him severely and recovery was allowed for his injuries.

In *US.. et al v. Boykin*, 49 Fed(2d) 762, the 5th Circuit Court of Appeals affirmed recovery of a seamen who was injured during a storm while placing plugs in ventilators which should have been put in before going to sea. In that case the court referred to the wave as a "tidal wave".

So also in this court in *Atlantic Transport Co v. Rosenberg Bros. & Co.*, 34 Fed.(2d) 843, there was a very small opening around a beam between the chain locker and the cargo hold. The vessel encountered a terrific storm and the water poured up the chain spouts into the chain locker and through this very minor opening into the cargo and damaged the cargo. On very conflicting evidence as to whether such could ever have been anticipated, this court held that the ship was unseaworthy and such unseaworthiness was the proximate cause of the damage to the cargo.

In *The Cricket*, 71 Fed.(2d) 61, this court held and, rightly, that where a personal injury claim is based upon unseaworthiness and consequently there is no liability for the negligence of fellow servants, and where the ship was in a harbor where storms and heavy seas are not to be expected and where the first wave coming on deck injured the libelant the sole cause of the injury was that heavy sea and there could be no recovery. But later in the case of *Matson Navigation Co. v. Hanson*, 132 Fed.(2d) 487, this court held that where the negligence of the ship owner concurs with the existence of a storm in causing injury the seaman is entitled to recover.

No justification was contended for nor offered by appellee for not having stowed the hawser prior to the time the sea started breaking over the deck. No explanation was given as to why the orders of the First Mate were not executed nor *why he did not see to it that they were executed.*

Appellant submits that the allegations of his libel were amply sustained upon the uncontroverted facts and that the conclusion of the learned trial judge upon those undisputed facts is manifestly incorrect.

III.

Damages

There are some major facts relative to appellant's injuries which were attested to by the witnesses for both parties. The appellant was severely injured at the time and all agree that he was violently thrown about by the wave. His leg immediately swelled up and he was in a dazed condition. Some three hours after, he stayed in bed for some 32 days taking pills the gun crew's quarters to the midships house. Thereafter, he stayed in bed for some 32 days taking pills and having hot packs put on his leg. It is agreed by the witnesses that thereafter he did light work until he left the vessel in July, 1947, some 5 months after the injury.

The only evidence of his condition thereafter is the evidence of the appellant himself who testified that he did light work on the return trip to the United States on the ROBIN GOODFELLOW; that he made two efforts subsequently to work, once in October of 1947, on the railroad and once in July of 1948, when

he attempted to work on the farm of his brother. Both times he was unable to do the heavy work required due to his injury. His testimony was that his back bothered him and that a lengthy period working on his feet caused his leg to swell. This evidence was not corroborated, nor, on the other hand, was it refuted or questioned.

The appellee elicited upon cross-examination from appellant that he has had a long history of nervousness. The extreme circumstances under which the appellant was injured and the nature of his injury are such that there is no doubt that by reason of the existence of his nervous instability the injury has caused him greatly increased suffering and has been pernicious and malignant.

The evidence further is that the libelant has only a fourth grade education and has had no experience or training in any form of light work, nor has he the ability or the education to acquire necessary skill for such work.

In *Walsh's case*, 63 Fed. Supp. 421, 1945 A.M.C., 747, 152 Fed.(2d) 46, 1945 A.M.C. 1513, the libelant was the same age as libelant in this case, that is to say 36 years. He fell injuring his back which the court found left him with a 20% disability due to the fact that he was unable to perform heavy labor. The trial court allowed him \$10,000.00 for the loss of future earnings, \$1300.00 for pain and suffering and \$1700.00 for medical expenses or a total of \$13,000.00. On appeal in a decision by Judge Learned Hand, the court raised the award for pain and suffering to \$4000.00 saying at page 1517:

“Probably the damaged condition of Walsh’s spine was in part congenital; but there can be no doubt that, however little the fall might have injured the spine of a normal man, it injured Walsh enough to subject him to a long and severe ordeal, and, in accordance with the general doctrine, the respondent must completely indemnify him, regardless of his idiosyncrasy. The Jefferson Myers, 45 Fed.(2) 162; Pieczonka v. Coleman Company, 89 Fed(2d) 353, 357; Oliver v. Yellow Cab Co., 98 Fed.(2d) 192.”

Appellant’s history has been one of continuous employment at heavy labor throughout his lifetime but after the injury a history of inability to do heavy labor until the time of trial, some 19 or 20 months after the accident.

The appellant was completely incapacitated from the time of his arrival in the United States in August, 1947, until the time of trial, August, 1948. Appellant’s base pay is shown in Libelant’s Exhibit I, but that, of course, does not reflect the true average earnings, as appellant’s disability prevented him from earning the overtime which is customary at sea. Appellant’s lost past earnings would appear reasonably to be \$3000.00 or \$3500.00. That coupled with appellant’s pain and suffering, on which subject there is no need to belabor this court, and his inability to perform heavy labor at the time of trial and for an indefinite future time would seem to justify an award in the approximate amount of libelant’s demand.

IV.

The Trial Court Erred in Holding That the Appellant Was Not Entitled to the Sum of \$35.31 Unlawfully Withheld From Appellant's Wages to Recompense the Appellee for Monies Paid By the Appellee for Appellant's Subsistence in Capetown, South Africa.

This argument is addressed to assignments of error (3) and (5), which are as follows:

(3) The court erred in failing to find that the appellee unlawfully withheld from the appellant sums of money paid by appellee for the retention of appellant in jail at Capetown, South Africa.

(5) The court erred in dismissing appellant's second cause of action.

At Capetown the appellant was incarcerated in the local jail by the American Consul pending his shipment back to the United States on the SS ROBIN GOODFELLOW (Tr. 33, 56). The respondent, appellee here, apparently paid subsistence for this period for it charged it against appellant in its final wage accounting (Libelant's Ex. 1).

This is clearly unauthorized under the statutes pertaining thereto.

Title 46 U.S.C.A. Section 678, 34 Stat. 100, reads as follows:

"It shall be the duty of the consuls and vice consuls, from time to time, to provide for the seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, *at the expense of the United States*, subject to

such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities." (Italics supplied)

A companion statute, 46 U.S.C.A. 679, 46 Stat. 261, requires masters of American vessels to accept such seamen for transportation to the United States and provides for payment by the government.

The ship owner had the right to declare a forfeiture from the appellant for neglecting to rejoin his vessel by deducting "from his wages not more than two days pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute," 46 U.S.C.A. Section 701 (second), 53 Stat. 1147. The ship owner did not choose to make claim for such expenses but that does not give it a right to claim some other penalty at its election, there being no statutory authority or rule or precedent therefor.

Exemplifying the duty of a government to provide subsistence and transportation to destitute seamen rather than any duty of the employer therefor is the case of *Alaska Steamship Co. v. U. S.*, 521 S. Ct. 159, 290 U.S. 256, 78 L. ed. 302. In that case a certain vessel of the Alaska Steamship Company was shipwrecked in Alaska and the crew thereof was returned to the United States by another vessel belonging to the same company. The Alaska Steamship Company sued the United States for compensation for such transportation under the provisions of Title 46 U.S.C.A. Section 679, and the Supreme Court held that they were entitled to recover. This holding

would seem to foreclose any duty on the part of appellee here to pay for the subsistence of the appellant while incarcerated at Capetown.

The ancient case law indicates that such was the rule prior to the enactment of this statute. In the case of *Magee et al. v. The Moss* (Gillp. 219) Fed Cas. 8944, it was said:

“There is a subordinate question in this case which must also be disposed of. The respondent claims a credit for certain prison fees paid at Havana for the libellants, or some of them. It appears that, except in the case of Ware, the men were imprisoned by, or at the instance of the captain; but Ware was put in gaol by the police officers of the city, for some misconduct or offense against the laws of the country. For the money paid by the captain to obtain his liberty from imprisonment he is justly chargeable, and the respondent must be credited with the amount. But no such credit will be allowed against the men imprisoned by the captain for his grievances or complaint. I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through the influence he may have with our consuls or the officers in a foreign port. It is always a most severe punishment, and in some climates dangerous to health and life. The punishments which the law authorizes the master to inflict on board of his vessel, by personal correction, by confinement and other privations, are generally sufficient for all purposes of discipline. It should be only in a case of some pressing necessity, of some danger to the vessel, or her master or crew, that the men should be imprisoned on shore.”

Likewise, in *The David Pratt*, 1 Ware (495) 509, Fed. Cas. 3597, it was said:

“If a master imprisons his seamen in a foreign gaol, he always does it at the risk of being called upon to answer for it on his return home. His right to punish his men in that way, except in cases of aggravated misconduct and insubordination, is, to say the least, questionable, and if he does resort to it, he is never permitted to charge the expenses upon the men, nor deduct their wages during the time of the imprisonment.”

It, therefore, seems clearly established that in the absence of proof by appellee of any liability on its part to pay said sums, and the absence of proof by appellee of any expenses incurred in hiring a substitute for the appellant giving it a right to recover under the provisions of 46 U.S.C.A. 701, the appellee clearly had no right to deduct this sum from appellant's pay. The trial court's statement that it seemed “reasonable that the respondent should have asked this libelant to reimburse the respondent for that \$35.00 * * *” seems insufficient in view of the statutory obligation expressly placed upon the government rather than appellee.

CONCLUSION

Appellant respectfully submits that the trial court erred in holding that the sole proximate cause of the accident and resulting injuries complained of by appellant was a hazard of the sea and in holding that appellant was not entitled to recover the sum of \$35.31 deducted from his pay for the cost of his subsistence in South Africa and in dismissing both ap-

pellant's causes of action and that the judgment should be accordingly reversed, and that this court should enter its judgment in favor of the appellant and determine and award to him his damages accordingly.

Respectfully submitted,

J. Duane Vance

Bassett & Geisness,

Proctors for Appellant

Docketed

In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN Co., a corporation,
Appellee

FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellee.

603 Central Building,
Seattle 4, Washington.

FILED



FEB 7 1949

PAUL P. O'BRIEN,

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In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN Co., a corporation,
Appellee.

No. 12124

FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant, a seaman, joined the SS ROBERT PARROT at Olympia, Washington on December 20, 1946, on a voyage to Japan, China, South Africa and return to the United States. The voyage terminated at Baltimore, Maryland, on September 8, 1947. Appellant missed the vessel at Cape Town, South Africa on July 3, 1947, and was subsequently returned to the United States on the SS ROBIN GOODFELLOW, reaching New York on August 3, 1947.

When the vessel left Olympia, Washington, new mooring lines for the stern of the vessel were taken aboard and secured to the bulwarks. It was necessary that eyes be spliced on the new lines enroute to Japan (Tr. 123).

There is some conflict of testimony as to the con-

dition of the weather after the vessel left Olympia, Washington, enroute to Japan. The course steered was a Southwest course of 225°. The vessel left Olympia, Washington, on January 1, 1947. Chief Mate Kloppenstein testified that the usual type of weather expected at that time of the year was encountered (Tr. 100) with the vessel taking seas over the bow and starboard side (Tr. 101).

On January 22, 1947, the weather became increasingly threatening and the Master of the vessel, deeming it unwise to permit the after mooring lines to remain secured to the after deck lest they be washed overboard and foul the propeller, ordered Chief Mate Kloppenstein to remove the same to the after deck house.

The Chief Mate visited the stern of the vessel to observe the mooring lines on two occasions shortly prior to ordering appellant and other seamen to accompany him. On one of these occasions the Master accompanied him on the tour of inspection. The vessel was then slowed down (Tr. 130) with just steerage way maintained and the vessel headed into the sea (Tr. 131). No seas were observed by the mate breaking over the stern.

Appellant and other seamen in the charge of the Chief Mate then proceeded to the after deck and while so engaged in chopping the lashings which secured the after mooring lines to the rail of the vessel, were struck by a sudden and unexpected freak wave, which engulfed the after deck of the vessel, throwing appellant and other seamen about and injuring

them. Later that afternoon, the after mooring lines were stowed in the after deck house without further incident (Tr. 91).

Appellant was treated by the Purser of the vessel for a badly bruised right leg and confined to his quarters until the vessel reached Yokohama, Japan, on January 27, 1947. At Yokohama and at Saipan, the next port of call, appellant was examined by shoreside military doctors. About the middle of February, 1947, after the vessel left Saipan enroute for Hongkong, appellant returned to work and stood all his usual sea watches until he missed the vessel at Cape Town, South Africa, on July 3, 1947. During this period he was favored when possible by the Chief Mate and given lighter work (Tr. 136).

NATURE OF APPELLANT'S LIBEL

On or about November 13, 1947, appellant filed a libel in *personam* against appellee, W. R. Chamberlin & Co., a corporation, operators of the SS ROBERT PARROT, stating two causes of action. The first cause of action was laid under 46 U.S.C.A., §688, known as the Jones Act. The negligence pleaded was the failure of the officers of the vessel to remove the after hawser from the fantail or stern of the vessel before the vessel encountered heavy seas. Appellant's second cause of action was based upon his wrongful abandonment in Cape Town, South Africa. This second cause of action has been waived by appellant except for the claimed recovery of the sum of \$35.31, which appellee deducted from appellant's wages to reim-

burse it for appellant's expenses in Cape Town after missing the vessel.

In the trial of the case, appellant, and his three witnesses, Bernard R. Englund, Oliver M. Jacobson and Peter C. Mydske, testified orally. Appellee's witnesses, Chief Mate Kloppenstein, Purser Keith M. Brown and Herman M. Hermanson, testified by deposition. After the trial, the court entered a decree dismissing both causes of action with prejudice.

FINDINGS OF THE DISTRICT COURT

In dismissing appellant's first cause of action based upon negligence, the lower court entered the following findings:

II.

"That the injuries sustained by libelant were not due to any negligence on the part of the respondent but were due to perils and hazards of the sea in that the libelant was injured by being struck by a huge wave which engulfed the stern of the vessel where he was working." (Aps. 10, 11)

With reference to appellant's second cause of action for alleged abandonment, the court entered the following finding:

V.

"That Menefee's failure to join the vessel was due to his own misconduct and not caused by any act of the vessel or its officers in abandoning him." (Aps. 11)

WEIGHT TO BE ACCORDED FINDINGS IN THE DISTRICT COURT

Where the trial in the lower court in an admiralty appeal is heard both upon oral and deposition testimony, the rule announced by this court is that the court will give to the findings of the lower court such weight as its judicial discretion dictates.

Matson Navigation Company v. Pope & Talbot, 149 F.(2d) 615;

United States v. Lubinski, 153 F.(2d) 1013.

Kawada v. United States, 116 F.(2d) 615.

APPELLANT'S INJURIES PROXIMATELY DUE TO UNANTICIPATED FREAK WAVE

On leaving Olympia, Washington, the vessel steered the usual southerly course employed during winter months destined to take it in the vicinity of 25° to 30° North Latitude (Tr. 122). As projected, this latitude would place the vessel opposite the Coast of Mexico. The Chief Mate stated that a week out of Olympia, Washington, they encountered "moderately heavy weather and usual heavy seas" (Tr. 101). The seas were breaking over the forward and starboard side of the vessel just before appellant's injury. Kloppenstein, the Chief Mate, before ordering appellant and his watch to the fantail or stern to stow the mooring lines, made two trips to this region and observed that no seas were coming over the stern (Tr. 104). Appellant and several other seamen were then turned to and engaged in cutting the lines secur-

ing the mooring lines with axes. What then occurred is best graphically described by Chief Mate Kloppenstein:

“Answer: Well, I brought—I took the men aft and stationed them at intervals to handle the line as quickly as possible, and opened the port passageway door and started to cut the lashings. I had cut one through and had started to cut the second one and there was a tremendous sea—a series of tremendous seas at that particular time—it started the vessel pitching heavily and the Captain had already slowed the vessel down after we went aft—and it didn’t seem to be dangerous at that time, but suddenly, this one of these heavy seas came up—the vessel seemed to back squarely into the sea—it stopped—it actually didn’t, but it seemed that way. Water came over from both sides and the stern, and washed everyone forward against the deckhouse.

“Question: Now, after the sea came over—was that only one sea?

“Answer: Only one sea.” (Tr. 104, 105)

Oliver Jacobson, appellants’ witness, corroborated Chief Mate Kloppenstein as follows:

“Q What happened when you got outside?

“A Well, we just got around to the stern and started cutting the line so we could drag it in and a wave came along.

“Q How big a wave?

“A Well, it was up to the gun tub.

“Q It engulfed all of you, did it?

“A Yes.” (Tr. 82)

Appellant did not see the wave which struck him (Tr. 44).

After a twenty-minute wait for the seas to spend their fury, it was necessary for Mydske to return to the fantail with other seamen and work approximately two or three hours before the lashings were cut and the lines were stowed away (Tr. 91).

IT HAS LONG BEEN RECOGNIZED THAT THE SEAMAN ASSUMES THE RISKS NORMALLY INCIDENT TO HIS PERILOUS CALLING

The Iroquois, 194 U.S. 240, 48 L. ed. 959;

The Arizona v. Anelich, 298 U.S. 110, 80 L. ed. 1085.

The most constant of these hazards as reflected in litigation of this type are the unpredictable vagaries of the wind and the seas.

This court recognized the non-liability of the vessels for injuries to a seaman caught by a huge wave unexpectedly sweeping over the vessel in the case of *The Cricket* (1934) 71 F.(2d) 61, where the court said at page 63:

“(2) The life of a seaman is hard. The nature of his calling subjects him to many dangers. One of these is the hazards of a heavy sea. The sailor knows this and assumes the risks incidental to his calling. In *Maloney, etc., v. U. S.*, 7 F. Supp. 15, 1928 A.M.C. 288, the deceased was struck by a heavy wave (the first to come on deck), which threw him down a stairway causing injuries from which he died. It was held that the accident was due to natural perils of navigation, which Maloney assumed.”

A similar view was taken in the later case decided by this court, *Matson Navigation Company v. Hansen* (1942) 132 F.(2d) 487, where the court said at page 488:

“(2, 3) The complaint invokes the provisions of the Jones Act, 46 U.S.C.A. §688, and the question is whether the place in which appellee was required to work was reasonably safe in the circumstances existing at the time. Obviously, the test of reasonable safety varies with the prevailing conditions. No liability flows from requiring a sailor to perform his necessary sailor’s duties with the ship rolling and lurching in a heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck. * * *”

The rule of non-liability of the vessel for injuries caused to seamen by reason of heavy weather was also followed in the case of *Maloney v. United States*, 7 F. Supp. 14, where United States District Judge Goddard of the New York District Court dismissed the libel for the following reasons:

“In view of all the circumstances, the size of the ship, that the deck where Maloney was working was 30 to 35 feet above the sea level, that it was not unusually heavy weather, and the uncontradicted testimony that, while spray had come aboard during that morning, this was the first wave to come aboard, it cannot fairly be said that Maloney was ordered to work in an unsafe place, or that there was negligence in failing to bring the ship up into the wind while the ‘save-alls’ were being put up. Looking back, it does not appear that any one did anticipate that such

a wave would come aboard during that time, or that it should have reasonably been anticipated. It was a most unfortunate occurrence, but the result does not warrant holding that those in command were lacking in their exercise of care and judgment for the protection of the crew. * * *

“* * *

“(3) The conclusion from all the evidence is that Maloney’s death was due to the natural perils of navigation, a risk which a seafaring man himself assumes. *The Robert C. McQuillen* (D.C.) 91 F. 685, 35 Cyc. p. 1244 and cases cited, and the libel must therefore be dismissed.”

Similarly, in the case of *Kleffman v. Dollar Steamship Lines*, 1933 A.M.C., 471, in a decision of the United States District Court, for the Northern District of California, the holding was:

“‘It would appear that the cause of the unfortunate accident was a heavy wave, commonly called a freak sea, which broke over the ship, and was entirely unexpected and could not have been reasonably anticipated.’

“‘Seamen must be held to assume the risk of injuries from any and all dangers ordinarily and naturally incident to the service. This case falls within that rule, and is not within any of its exceptions.’ Judgment for defendant.”

We feel that these authorities and the factual situation presented by the evidence adequately sustain the decision of the lower court in holding that the wave which injured appellant was unexpected and a freak wave, for the consequence of which no liability attaches to the appellee.

FAILURE TO STOW MOORING LINES PRIOR TO INJURY

Appellant seeks to spell out negligence on the part of the vessel because of the failure of the Boatswain to stow the after mooring lines prior to appellant's injury. Chief Mate Kloppenstein testified he had instructed the Boatswain to do so.

The record abounds with ample testimony that the after mooring lines were exceedingly well secured and lashed to withstand the expected winter weather in the South Pacific on the voyage to Japan. Appellant testified:

"Q Did I understand you to say that that hawser on the fantail had been securely lashed before you left Olympia?

"A Yes.

"Q Did you then place additional lashings on it from time to time?

"A Yes.

"Q And at the time that you went out to remove it, was it securely lashed?

"A Yes, it was.

"Q Where was it placed with reference to the fantail?

"A It was lashed on the port end of the fantail.

"Q What was it lashed to,—the bulwarks or some cleats?

"A The railing on the bulwarks and to the cleats on the gunwhale." (Tr. 40, 41)

It is to be recalled that when the attempt was made to stow the after mooring lines in the deck house at

the time of appellant's injury, it was necessary to use an ax to chop the lashing to free them.

This factual situation materially differs from the circumstances in two cases relied upon, particularly by appellant, *The William A. McKenney*, 41 F.(2d) 754, and *Ludwig v. United States*, 74 F. Supp. 29. In both of these cases, the deck cargo was improperly secured to withstand heavy weather and the seamen were injured in attempting to rectify this condition.

Furthermore, Chief Mate Kloppenstein testified that it was usual and customary to carry the after hawser secured to the after deck:

“Q As a matter of fact, it isn't necessary to carry this hawser like the Boatswain lashed this to the rail?

A We carried them that way on other ships.
(Tr. 126)

Appellant's witness, Mydske, similarly testified as follows:

“Q In other words, the hawser was as well secured as could be expected under ordinary circumstances?

“A It would have been better if it was below.

“Q No, I say insofar as ordinary circumstances were concerned it was well secured?

“A Yes,—ordinary circumstances.” (Tr. 93, 94)

FREAK WAVE NOT FORESEEABLE

Before the failure of the Boatswain to stow the after mooring lines before appellant's injury can be denominated negligence, it must appear that the dam-

age suffered by appellant was reasonably foreseeable. Unforeseeable consequences of a tortious act are not the natural and probable results of such act within the rules of proximate cause.

This court has recognized this rule in the recent case of *Sundberg v. Washington Fish & Oyster Co.* (1943) 138 F.(2d) 801 (C.C.A. 9), where the court said:

“Proof of negligence on the part of the shipowner involves at least a showing that under existing circumstances the shipowners or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew. * * * citing cases.”

This rule has been uniformly applied by various Circuit Courts to Jones Act actions.

“There is no actionable liability for an alleged negligent act unless injury resulting therefrom could have been foreseen in the light of the attending circumstances. Indeed, it may be said that, in the absence of wanton wrong or some failure to conform to some arbitrary or absolute standard of care ‘foreseeability’ is a necessary test of the existence of negligence, and, if no injury can reasonably be expected to result, there is no negligence.”

Johnson v. Kosmos Portland Cement Co. (C. C.A. 6) 64 F.(2d) 193.

“But we think the court committed a more fundamental error in not directing a verdict for defendant for want of substantial negligence in respect of both causes of action. In neither were facts shown which would lead the defendant to anticipate the danger of injury to its seamen by

virtue of the existing condition of the ship's appliances."

Pittsburg S.S. Co. v. Palo (C.C.A. 6) 64 F. (2d) 198.

"It was not an insurer, being liable only if the injury was reasonably foreseeable. It could not, however, have foreseen that libelant would walk into the pile of retarders just at the moment the lights went out. It follows that the court below was right in holding that there was no evidence of negligence imputable to respondent."

Calmar S.S. Corporation v. Taylor (C.C.A. 3) 92 F.(2d) 86.

Since the evidence affirmatively establishes that the mooring lines were at all times adequately secured on the after deck after the Boatswain completed splicing the eye of the lines in view of weather and seas normally expected and actually experienced on the voyage, the sudden apprehensions of the Master many days later that the lines might be washed overboard if unexpectedly heavy weather was subsequently encountered and the concurrence of the unanticipated freak wave which washed over the vessel were circumstances which could not reasonably have been anticipated or foreseen by the Boatswain at the time of his original neglect as the proximate result of his failure to stow the mooring lines.

HEAVY SEAS AN INTERVENING CAUSE

If the court is of the opinion that the Boatswain was guilty of negligence in not stowing the after mooring lines prior to appellant's injury, it is sub-

mitted that this act on the part of the Boatswain is too remote an incident to be considered as a proximate cause of appellant's injury. This was due to a new, active and efficient cause, namely the unanticipated breaking over the vessel of a freak wave.

"An act which furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus, where a negligent act creates a condition which is subsequently acted upon by another unforeseeable, independent and distinct agency to produce the injury, the original act is the remote and not proximate cause of the injury, even though the injury would not occur except for the act. In such a case the law being concerned with proximate rather than the remote cause does not look beyond the cause of injury most recently operative in determining liability for the injury." 38 American Jurisprudence, Sec. 68, p. 725.

The United States Supreme Court has announced and applied this rule in a number of cases, the leading case being *Atchison T. & S. R. Co. v. Calhoun*, 213 U.S. 1, 53 L. ed. 671, where the court said:

"Where in the sequence of events between the original default and final mischief an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall 44, 52, 19 L. ed. 65, 67. *This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor.*" (Italics ours)

PHYSICAL DAMAGES SUSTAINED BY APPELLANT

Since the lower court dismissed the libel, no findings were made as to any damages. On the trial of the case, appellant stressed the fact that he was still somewhat incapacitated from an alleged injury to his back, although the testimony of Brown, the Purser, who took care of appellant after his injury on board the vessel (Tr. 143) and that of his shipmates, Englund (Tr. 73), and of Jacobson (Tr. 84), indicates that the only injury sustained was to his right leg. Furthermore, the libel filed October 22, 1947, alleges only an injury to appellant's right leg resulting from his accident.

Brown, the Purser and Pharmacist's Mate, stated he treated appellant until the vessel reached Yokohama on January 27, 1947, where he had an Army doctor examine appellant. A subsequent medical examination occurred at Saipan in the middle of February, 1947. Appellant thereupon resumed his regular sea watches until he missed the vessel in Cape Town, South Africa, in July, 1947. During this four-month period, he neither asked for nor received any further medical treatment either from Brown, nor did he seek to have any further medical examinations or treatment at the numerous ports touched at by the vessel enroute from Saipan to Cape Town.

Furthermore, the evidence establishes that since the return of appellant to the United States in August, 1947, and to the time of the trial of the case on August 17, 1948, appellant had not received any medical treatment, although the same was available to him gratuitously at any United States Marine Hospital.

In the trial of the libel, appellant called no physician to corroborate any claims of temporary or permanent physical disability incurred by him as the result of his accident.

Appellant's unsubstantiated assertion as to his physical condition must be considered in the light of his admission that since childhood he has been afflicted with a nervous disease. It would seem more appropriate to assign his subjective complaints of pain made at the trial as springing from this emotional instability rather than the effects of his injury in view of his work record of almost four and a half months and his failure to have any medical treatment since February, 1947, or present any medical testimony for the guidance of the court in the trial of the libel.

It is respectfully suggested that in the event of a reversal of the lower court's decision that the matter of the damages, if any, to which appellant is entitled, should be referred back to that tribunal for appropriate findings.

In *Walsh's Case*, 63 F. Supp. 421, referred to in appellant's brief, there was ample expert medical testimony offered establishing permanent injury to the bony structure of the back. Here, no such testimony was offered and there is very grave doubt whether appellant received any back injury, as presently claimed by him at the time of his accident. The award of any substantial damages would, of necessity, be based on speculation and conjecture in the record presented to this court.

APPELLEE ENTITLED TO REIMBURSEMENT FOR APPELLANT'S SUBSISTENCE IN CAPE TOWN

The evidence establishes that appellee was required to pay the sum of \$35.31 for the costs of appellant's subsistence after missing the vessel in Cape Town, until he could be repatriated on the SS. ROBIN GOODFELLOW.

The circumstances surrounding the missing of the vessel by appellant are recounted in part by his letter of August 30, 1947 (Respondent's Exhibit A-3) addressed to appellee, reading in part as follows:

"Being as I had picked up a girl, had decided to spend the night with her, believing that I did not half to be back to the ship until 8 o'clock the next morning.

"As is were did not get back to the docks until 8:30 o'clock next morning discovering that during my absent the ship had left.

"I thought maybe at the time the ship had shifted to another dock so had Cabbie drive to most of the docks—but no ship—so I called the American Council at around 9 o'clock but his secretary said he had not arrived at the office yet so I hung up.

"There were a C-4 type ship in the harbor tried to go aboard her to ask information from some one in authority, as to what I should do but were not aloud aboard her—so didn't get no information.

"At the time I did not know that I could of gotten this information from the Port Captain.

"Being excited and nervous I gave up trying to find my ship beliving that it had left for good,

so I did not report to the American Council until the following day."

The record further establishes that about 9:00 A.M. on the morning appellant failed to rejoin the vessel, the vessel left its pier and waited in the stream at Cape Town for appellant. The Purser was sent ashore to search the town for him. The vessel waited for appellant until 1:00 P.M., causing additional delay and expense to the vessel. While appellant testified that he reported to the American Consul on the morning of his failure to join the vessel, his letter indicates to the contrary.

"Being excited and nervous I gave up trying to find my ship believing that it had left for good, so I did not report to the American Council until the following day."

Appellant claims that Title 46 U.S.C.A. Section 678, 34 Stat. 100, reading as follows, is applicable:

"It shall be the duty of the consuls and vice consuls, from time to time, to provide for the seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities."

Appellant then cites as authorities cases disallowing a credit to the Master of the vessel for seamen whom the Master himself has imprisoned in foreign ports,

and where the vessel has been obliged to pay for their subsistence. Obviously, these authorities are inapt in a situation where the misconduct of the seaman causes damage to the vessel, such as occurred in this case.

The right of the ship to recoupment in such circumstances has long been recognized in the admiralty law. In the recent case of *Shilman v. United States*, 164 F.(2d) 649, the court said:

“(2) The cases cited by the appellees in support of a set off of \$200 all fall within the category of expenses incurred on behalf of the ship in connection with the voyage. Sometimes they have related to hiring a substitute for a deserting seaman or for securing his return; sometimes for making the vessel good out of a seaman’s wages for medical expenses occasioned by his assault on a member of the crew; at other times there have been deductions for a smuggling of goods which subjected the vessel to jeopardy or for allowing a stowaway to be on board. *Swanson et al. v. Torrey et al.*, 4 Cir., 25 F.(2d) 835; *The Ellen Little*, D.C. Mass., 246 F. 151; *The W. F. Babcock*, 2 Cir. 85 F. 978; *The T. F. Whiton*, D.C. S.D. N.Y., Fed. Cas. No. 13,849; *Snell et al. v. The Independence*, D.C. E.D. Pa., Fed. Cas. No. 13,139; *Scott v. Russell*, D.C. S.D. N.Y., Fed. Cas. No. 12,546; *Magee v. The Moss*, D.C. E.D. Pa., Fed. Cas. No. 8944.”

In *Willard v. Dorr*, Fed. Cas. No. 17,680, in explaining the legal basis of permitting such deduction, Judge Story said:

“* * * The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt

or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as a restitution in value for damages sustained in consequence of gross violations of the contract for such services. * * *."

In *The T. F. Whiton*, Fed. Cas. No. 13,849, 23 Fed. Cas. page 873, the court said:

"* * * That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has often been held. *Scott v. Russell* (Case No. 12,546); *Brown v. The Neptune* (Id. 2,022); *The Tusker* (Id. 14,274)."

CONCLUSION

We respectfully submit that the decision of the District Court in denying the appellant a recovery is correct and that the District Court decision should be affirmed.

Respectfully submitted,

BOGLE, BOGLE & GATES,

EDW. S. FRANKLIN,

Proctors for Appellee.

No. 12,125

IN THE

United States Court of Appeals
For the Ninth Circuit

TUCKER PRODUCTS CORPORATION, <i>Plaintiff and Appellant,</i>	}
VS.	
GEORGE S. HELMS, etc., et al., <i>Defendants and Appellees.</i>	

APPELLANT'S PETITION FOR A REHEARING.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
BY NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
*Attorneys for Appellant
and Petitioner.*

FILED

DEC 31 1948

PAUL P. O'BRIEN,

CLERK

No. 12,125

IN THE

**United States Court of Appeals
For the Ninth Circuit**

<p>TUCKER PRODUCTS CORPORATION, <i>Plaintiff and Appellant,</i></p> <p>VS.</p> <p>GEORGE S. HELMS, etc., et al., <i>Defendants and Appellees.</i></p>

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals, for the Ninth
Circuit.*

Comes now plaintiff and appellant above named and pursuant to Rule 25 of the above entitled Court, files this, its petition for rehearing of those certain orders made and entered on December 14, 1948 in the above entitled matter, and in support thereof states its grounds as follows:

I.

The order dismissing the appeal was in error because it purported to grant a motion which was not

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—SS.

Norman Leonard, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff and appellant in the within action; that he makes this verification for and on behalf of said plaintiff and appellant for the reason that said plaintiff and appellant is presently out of the county in which affiant has his offices; that he has read the foregoing Petition for Rehearing and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

NORMAN LEONARD.

Subscribed and sworn to before me this 29th day of December, 1948.

Sig. attested on orig. Dec. 29
Alice C. Morse, Not. Pub.

(Seal)



Notary Public in and for the City and
County of San Francisco, State of
California.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellant in the foregoing proceeding and that the foregoing Petition for a Rehearing is in my judgment well-founded and that it is not interposed for delay.

Dated, San Francisco, California,
December 29, 1948.

NORMAN LEONARD.







No. 12,125

IN THE

United States Court of Appeals
For the Ninth Circuit

TUCKER PRODUCTS CORPORATION,
Plaintiff and Appellant,

VS.

GEORGE S. HELMS, etc., et al.,
Defendants and Appellees.

AFFIDAVIT OF NORMAN LEONARD.

STATE OF CALIFORNIA,

CITY AND COUNTY OF SAN FRANCISCO.—SS.

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff and appellant in the above entitled matter. That with respect to so much of the Court's order granting a motion to dismiss the appeal purportedly made by the defendants and appellees, the fact is that no such motion was ever served upon your affiant as counsel for plaintiff and appellant, nor on your affiant's office or anybody in your affiant's office, and your affiant is informed and believes and therefore alleges that no such motion was ever filed with the Clerk of the above entitled Court.

That the judgment of the District Court in the above entitled matter was made and entered therein on August 4, 1948. That your affiant, without waiting for the expiration of the statutory period within which notice of appeal might be filed, did file his notice of appeal only seven days after the said judgment was entered, to-wit, on the 11th day of August, 1948, although he might have waited, had he desired to be dilatory, until the 4th day of September, 1948. (In such a case, the statutory period for docketing the record on appeal would not have expired until December 4, 1948, three days after the final tender of the transcript and the filing fees to the Clerk of this Court.) That thereafter and on August 24, 1948, the designation of record on appeal was filed by your affiant on behalf of plaintiff and appellant. That no counter-designation was filed by defendants and appellees.

That almost immediately after August 24, 1948, your affiant's professional attention and energies were almost exclusively directed toward various problems which arose out of the labor relations situation which was then developing in the Pacific Coast maritime industry. That in this connection your affiant avers that his office is counsel for three of the unions which were involved in the said situation, to-wit: International Longshoremen's and Warehousemen's Union, National Union of Marine Cooks & Stewards, and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association. That the labor relations affairs of said Unions, principally the first two named, are

generally handled by Richard Gladstein, of your affiant's firm, but that Mr. Gladstein was out of the City and County of San Francisco during most of the period of time in question professionally engaged in other matters, and that your affiant was therefore assigned the responsibility of handling the affairs of said Unions during the said period of time. That during the last week of August, 1948 (this was immediately after the filing of the designation of the record on appeal in this matter), there was an intensive series of negotiations between the officers and negotiating committees of the above mentioned Unions and the officers and negotiating committees of the Waterfront Employers Association of the Pacific Coast and of the Pacific American Shipowners Association because of the fact that an eighty-day injunction obtained by the United States Government from the United States District Court for the Northern District of California, No. 28123-H, under the provisions of § 208 of the Labor Management Relations Act of 1947 as amended, was due to expire on September 2, 1948, and in the event that negotiations were unsuccessful, it was clear that there would be a tie-up of all maritime operations on the Pacific Coast. That during the last several days of August and the first two days of September, your affiant was constantly in touch and communication with the officers and committees of the Unions above mentioned and consulting with them, and was advising them in connection with the said negotiations.

That the negotiations were unsuccessful and thereafter on September 2, 1948, the tie-up of the maritime

industry on the Pacific Coast commenced. That this tie-up involved approximately 40,000 employees in the maritime industry on the Pacific Coast and brought the entire maritime industry on the Pacific Coast to a complete standstill. That as a result of this situation and stemming from it, there was extended litigation in which your affiant had to participate personally. Among such litigation was the following:

Beginning on September 1, 1948, and continuing with some interruption until October 28, 1948, there was heard before a Trial Examiner of the National Labor Relations Board a complaint issued by the General Counsel of the National Labor Relations Board against the International Longshoremen's and Warehousemen's Union charging that Union with violations of the Labor Management Relations Act of 1947 upon the ground that that Union's alleged insistence upon certain hiring hall practices contravened certain of the unfair labor practice provisions of the said statute. This hearing (NLRB No. 20-CB-19 and 20-CB-38), as has been indicated, lasted with some interruptions, for the two full months of September and October. The transcript of testimony runs to 2,395 pages and there were over 100 exhibits of a documentary nature introduced. These exhibits contained contracts, negotiating committee minutes, reports, etc. The legal problems presented by this case are novel and complex in that they involve the construction and application of a new statute to a difficult and complicated factual situation.

During an intermission in the aforementioned case against the International Longshoremen's and Warehousemen's Union, your affiant was required to be present in the City of New Orleans, Louisiana, in connection with certain litigation there pending which involved the National Union of Marine Cooks & Stewards and the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association before the National Labor Relations Board, the Federal District Court, and the State Courts of Louisiana. This litigation grew out of picketing by the said Unions for a purpose alleged by the Government to be illegal, e.g., that it was a furtherance of the secondary boycott. Your affiant was present in New Orleans, Louisiana, in connection with these matters from on or about October 10, 1948, to on or about October 16, 1948. The cases involved were NLRB No. 15-CC-10 to 15-CC-15 inclusive, and 39-CC-1 and 39-CC-2 and Federal District Court No. 2265 (Eastern District of Louisiana).

During the intermission in the aforementioned case against International Longshoremen's and Warehousemen's Union, your affiant was in attendance on behalf of that Union at a hearing of a sub-committee of the Committee on Education and Labor of the House of Representatives held in the City and County of San Francisco on October 22, 1948. Your affiant was present both as counsel and as a witness in connection with matters concerning which the said Committee was investigating.

Immediately upon the conclusion of the aforesaid hearing before the National Labor Relations Board

on October 28, 1948, there was commenced on November 1, 1948, before a Trial Examiner of the National Labor Relations Board another hearing on a complaint issued by the General Counsel of the said Board against the National Union of Marine Cooks & Stewards. This hearing (NLRB No. 20-CB-20) continued without interruption until November 12, 1948. The transcript of testimony contained 1,252 pages and over 50 exhibits of a documentary nature were introduced.

Immediately upon the completion of the last mentioned hearing, there was commenced another hearing before a Hearing Officer of the National Labor Relations Board involving certain charges with respect to an alleged jurisdictional dispute in which the National Union of Marine Cooks & Stewards and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association were involved. This hearing (NLRB No. 36-CD-2 and 36-CD-3) lasted until November 22, 1948, and the transcript of testimony contains 555 pages and some 25 documentary exhibits were introduced. This case was one of first impression in that it involved the construction and application of a section of the Labor Management Relations Act of 1947 which has never heretofore been passed upon by the National Labor Relations Board or by the Courts.

It was necessary for your affiant personally to attend all of the sessions of the various hearings and proceedings as aforesaid as there was no other attorney in your affiant's office who was familiar with the legal and factual problems presented by these cases, and your affiant did attend each of the sessions of each

of the aforesaid proceedings and did devote all of his time, energy and attention during the months of September, October and November to the aforesaid matters.

Beginning with the last week in November, 1948, at about the time of the conclusion of the proceeding which terminated on November 22, 1948, as aforesaid, there were further negotiations between the aforesaid Unions and the aforesaid employer associations which resulted in agreements being reached between the parties with the resumption of work on or about December 1, 1948. That during that last week of November, your affiant again consulted with and advised the officers and committees of the respective Unions, prepared contract language for them, reviewed contract language submitted by the employer associations and generally participated as legal counsel in the negotiations which led up to the termination of the trade dispute.

In the foregoing it appears that your affiant's professional energies and attention during the months of September, October and November, 1948, were quite completely taken up with matters of singular importance not only to his aforesaid clients, but to the entire shipping industry and economy of the Pacific Coast.

For the foregoing reasons, your affiant respectfully urges that the failure to docket the record on appeal in the instant case, while it may be the result of neglect on the part of your affiant, is at the very least a result of very excusable neglect and that the Court

should have exercised its discretion by permitting said record to be docketed.

That in connection with the docketing of the said record, the following facts should be made known to the Court:

That after the filing of the designation of record on appeal on August 24, 1948, your affiant almost immediately became involved in the activities hereinabove recited. That your affiant anticipated that the Clerk of the District Court would make arrangements to docket the record or would obtain the necessary extensions of time within which to do so (which as a matter of fact the Clerk did for the 90 day statutory period). Your affiant does not suggest that the Clerk was in any way derelict in his duties, but your affiant's office's past experience with appeals to this Court were such as to lead your affiant to believe that the matter would be taken care of by the Clerk simply as a matter of routine either by communicating with your affiant prior to the expiration of the 90 day period or by docketing the record and then billing your affiant's office. To your affiant's knowledge, the credit of his office for the payment of transcript and docket fees has never been questioned by any of the Clerks of any of the Courts in which his office practices

On November 26, 1948, your affiant received a telephone call from one of the deputy clerks of the District Court, whose name your affiant cannot now recall, and was advised by said deputy that the transcript was in the District Court Clerk's office and was asked by the deputy what affiant wished to do about it.

Affiant asked why the transcript had not been docketed and was informed that the District Court Clerk's fee had not been paid (your affiant has since checked with his office personnel and is informed and believes and therefore alleges that at no time did the District Court Clerk submit a bill to your affiant's office for payment or request that payment be made, or in any way communicate with your affiant's office between August 24, 1948, and November 26, 1948). That your affiant thereupon in the same telephone conversation informed the same deputy clerk that the check would be sent out immediately for payment of the Clerk's fee, and requested that upon receipt of the check, that the record be transferred to the Clerk of this Court. On the same day, November 26, 1948, your affiant did send a check for the fee to the District Court and this check was accepted by said Clerk and a receipt therefor was issued. That at the same time your affiant sent out with the messenger who delivered the check to the Clerk of the District Court a proposed order for a Judge of this Court to sign, permitting the docketing of the record on appeal, even though the statutory time had expired. A true and correct copy of the instructions to the messenger concerning this matter is attached hereto and marked Exhibit "A". That the said order was not submitted to a Judge of this Court for signature because, so your affiant is informed and believes and therefore alleges, the Clerk informed the messenger that it would be necessary to make a motion under the provisions of Rule 19, and returned the papers. The Clerk typed a notation upon

the sheet which contained the instructions to the messenger to this effect. That notation typed by the Clerk of the Court appears as the last five lines on Exhibit "A" attached hereto.

Thereupon your affiant immediately prepared the notice of motion, motion, affidavit and memorandum of points and authorities, which were filed and served herein on December 3, 1948. It was this motion which the above entitled Court denied on December 14, 1948. (Affiant again wishes to call attention to the fact that at the time the notice of motion was served and filed, the 90 day statutory period which *could* have commenced on September 4, 1948, in the event that the notice of appeal had been filed on the last day which was available to your affiant, had *not* expired.)

For the foregoing reasons, your affiant respectfully prays that the Court grant the within Petition for Rehearing and reconsider its ruling upon your affiant's motion for an order extending time within which to docket the record on appeal and permit the docketing of the record on appeal.

NORMAN LEONARD.

Subscribed and sworn to before me this 29th day of December, 1948.

(Seal)



Sig. attested on orig. Dec. 29
Alice C. Morse, Not. P. C.

Notary Public in and for the City and
County of San Francisco, State of
California.

EXHIBIT A

ATTORNEYS MESSENGER SERVICE

717 Market St.

San Francisco 3

DOuglas 2-8778

Case No.....

11/26/48

Tucker Products Corp. v. Helms, et al.

Please

Deliver to.....
(Name) (Address)File at.....
(Court)Deliver.....to Sheriff
Writ or Order

Costs Enc.....Costs Pd.....Costs Adv.....

SPECIAL INSTRUCTIONS:

1. Pay fee of \$11.50 to Clerk of District Court.
2. Have Judge sign attached order, and file original; leave as many copies as necessary.
3. Return extra copies to us.

Dear Mr. Leonard:

In the circumstances, it is advisable for you to follow the provisions of Rule 19 with respect to your motion. Papers returned.

A 05636

leonard (n) Atty.



No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and
ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner 13th
Compensation District, Bureau of Employees Com-
pensation, Federal Security Agency and ANNA
ANDERSON,

Appellees.

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

JAN 20 1949

PAUL R. O'BRIEN,
CLERK

No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and
ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellants,

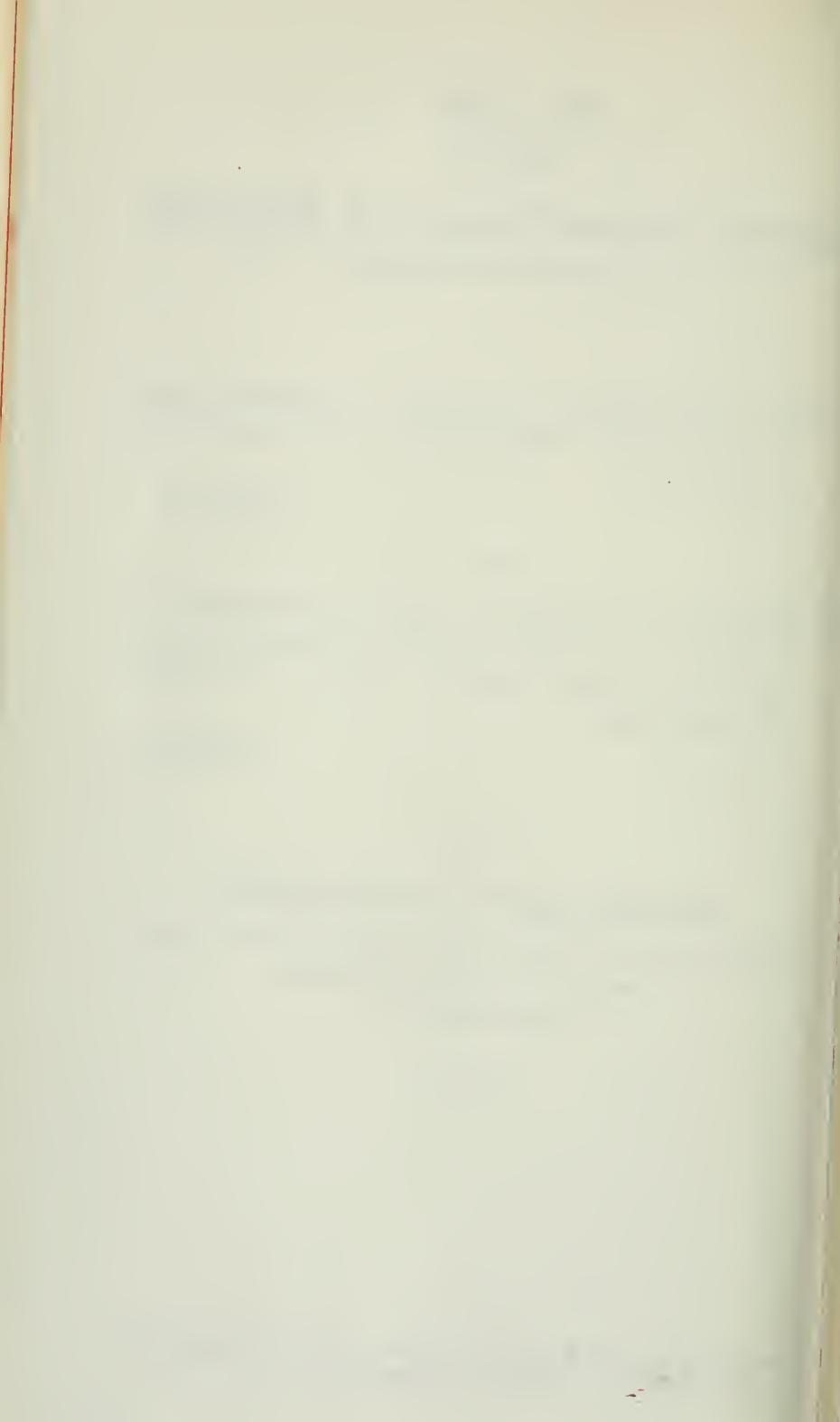
vs.

WARREN H. PILLSBURY, Deputy Commissioner 13th
Compensation District, Bureau of Employees Com-
pensation, Federal Security Agency and ANNA
ANDERSON,

Appellees.

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the
Southern District of California
Central Division



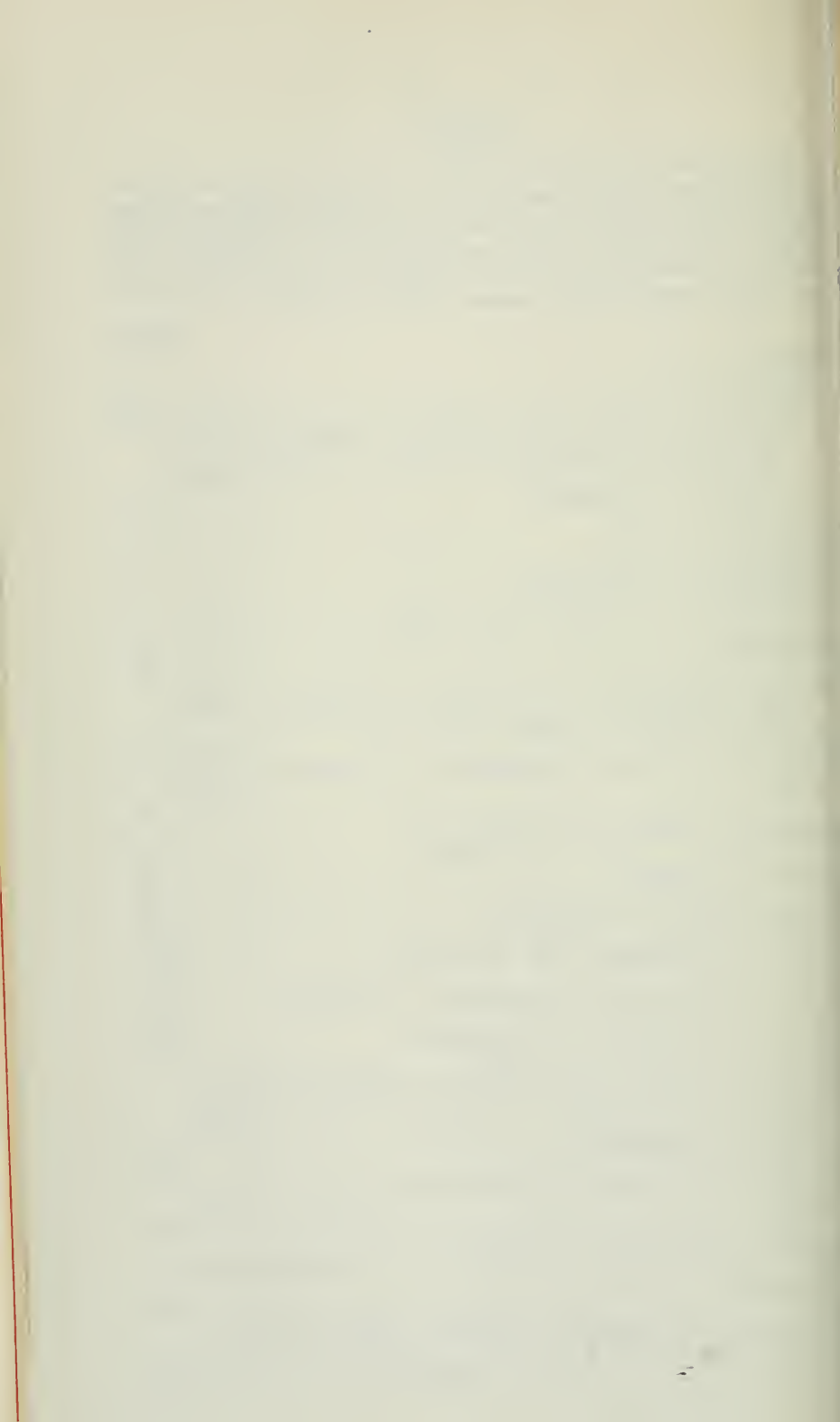
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

SYRIL S. TIPTON

TIPTON & WEINGAND

PATRICK H. FORD

1220 Broadway Arcade Building
Los Angeles 13, California

For Appellee Pillsbury:

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

LEILA F. BULGRIN

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building
Los Angeles 12, California

For Appellee Anderson:

JOHNSON & KAPLAN

704 South Pacific Avenue
San Pedro, California [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California

Central Division

No. 8075-BH

BURNS STEAMSHIP COMPANY, a corporation, and
ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Plaintiffs

vs.

WARREN H. PILLSBURY, as Deputy Commissioner
13th Compensation District, Bureau of Employee
Compensation, Federal Security Agency; and ANNA
ANDERSON,

Defendants.

COMPLAINT FOR INJUNCTION

Plaintiffs complain of defendants, and for cause of
action allege as follows:

I.

Jurisdiction is founded on the existence of the question arising under Title 33 U. S. Code, Section 921, 44 Stat. 1436, as amended, 49 Stat. 1921.

II.

The plaintiff Burns Steamship Company is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California and doing business within the judicial district in which this complaint is filed.

Plaintiff Associated Indemnity Corporation is, and at all [2] times herein mentioned was, a corporation duly organized and existing under the laws of the State of California and authorized to do an insurance business in the State of California. At all times herein mentioned, said Associated Indemnity Corporation was the insurance carrier for the plaintiff Burns Steamship Company for the liability arising under the Longshoremen's and Harbor Works' Compensation Act, Act of March 4, 1947, 44 Stat. 1424, 33 U. S. Code 901 to 950.

III.

On November 29, 1947, plaintiff Burns Steamship Company was the employer of one John A. Anderson, the husband of the defendant Anna Anderson. On said date, said John A. Anderson sustained an injury in this judicial district, to-wit: in the Southern District of California, which said injury resulted in the death of said John A. Anderson.

IV.

At the time of the injury and death of said John A. Anderson, as described in paragraph III, the said John A. Anderson was an employee of the plaintiff Burns Steamship Company.

V.

The facts and circumstances preceding the injury and death of said John A. Anderson, as described in paragraph III, are set forth in narrative fashion in the Findings of Fact made by defendant Warren H. Pillsbury, as Deputy Commissioner of the 13th Compensation District,

Bureau of Employees Compensation, Federal Security Agency, a copy of said Findings of Fact and the Award made thereon is annexed to this complaint and marked Exhibit "A", and incorporated herein by reference with the same force and effect as if set forth in full.

VI.

On or about February 27, 1948, defendant Warren H. Pillsbury [3] made the Findings of Fact and Award in this case, a copy of which is attached to this complaint and marked Exhibit "A", which said Award directed the plaintiffs herein to pay to the defendant Anna Anderson, the sum of Two Hundred Dollars (\$200.00) as burial expense, payable to McNerny's mortuary, and Thirty-four Dollars (\$34.00) to said defendant Anna Anderson. Said Award further provided for the payment of \$163.19 forthwith to said Anna Anderson, and the further sum of \$13.13 per week, payable in installments every two weeks, or monthly, at the election of said defendant Anna Anderson, until further order of the Deputy Commissioner, subject, however, to a lien in favor of Grover Johnson, attorney for said Anna Anderson, in the sum of One Hundred Twenty-five Dollars (\$125.00), payable directly to said attorney.

This complaint will be filed within thirty days after the date of said Award, in accordance with the provisions of Section 921(2) of Title 33 U. S. Code.

VII.

Plaintiffs contend that the Findings and Award, a copy of which is annexed to this complaint and marked Ex-

hibit "A", are not in accordance with the law and are beyond the jurisdiction of the defendant Warren H. Pillsbury, as Deputy Commissioner of the 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, in that the injury and death of the said John A. Anderson was not an accidental injury or death arising out of and in the course of employment, within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and particularly, Section 902(2) and Section 909 of said Act. Plaintiffs contend that the undisputed and uncontradicted evidence taken by the said defendant Deputy Commissioner established that the said John A. Anderson was injured and killed as a result of his own misconduct, in that he violated an instruction of the ship's mate, his superior officer, by directing a sling load of [4] coal to be brought on board ship. Plaintiffs contend that the Findings and Award in this case were not based upon substantial evidence, and were based upon mere surmise of the said defendant Deputy Commissioner. In this connection, the plaintiffs quote the following pertinent part of the Findings of the said defendant Deputy Commissioner:

"The sling load swung against him, causing injuries from which he died the same day. He had been previously requested by the ship's mate, a superior officer, to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch. The reasons for his disregarding said request are not known, although it may be surmised that he did so in order to obtain the sling in which said coal had been placed for the purpose of using it to discharge some waste and scrap

wood on the deck to the dock, an act permitted by the employer; that the act of bringing said coal on board was within the general scope of his duties in that it was part of his work to direct winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said direction of the mate was an act of minor disobedience in the course of his work and not an act taking himself outside the scope and course of his employment; * * *." (Underscore supplied.)

VIII.

Plaintiffs have no adequate remedy at law against the said Findings and Award, and this injunction proceeding is the exclusive and only remedy allowed by the said Longshoremen's and Harbor Workers' Compensation Act, Section 921(d).

Wherefore, plaintiffs demand:

1. That defendants be enjoined by appropriate process of this Court to show cause why a permanent injunction should not be granted to plaintiffs restraining the defendants from enforcing the aforesaid Award.
2. A judgment and decree of this Court establishing that the aforesaid Award is and was not in accordance with law, and is and was beyond the jurisdiction of the defendant Deputy Commissioner.
3. For such other and further relief as shall be just and equitable.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiff [6]

EXHIBIT "A"

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES COMPENSATION
13th Compensation District

In the Matter of the claim for compensation under the
Longshoremen's and Harbor Workers' Compensation
Act.

ANNA ANDERSON, Widow of JOHN A. ANDER-
SON, Deceased

Claimant

against

BURNS STEAMSHIP COMPANY,

Employer

ASSOCIATED INDEMNITY CORP.

Insurance Carrier

COMPENSATION ORDER—AWARD OF DEATH
BENEFIT

Case No. 3022-41

Claim No. 2978

Such investigation in respect to the above entitled claim
having been made as is considered necessary and a hear-
ing having been duly held in conformity with law, the
Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 29th day of November, 1947, John A. An-
derson, husband of the claimant herein, was in the em-
ploy of the employer above named at Los Angeles Harbor
in the State of California, in the 13th Compensation Dis-
trict, established under the provisions of the Longshore-

men's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Associated Indemnity Corp.; that on said day the said John A. Anderson while performing service for the employer as a longshoreman and engaged stevedoring operations on the "SS Daisy Gray" afloat on Navigable waters of the United States at said harbor sustained personal injury occurring in the course of and arising out of his employment and resulting in his death the same day as follows: [7] The said employee, while acting as hatch-tender, was signalling the bringing on board by the ship's winches of a swing load of coal for use in ship. The sling load swung against him, causing injuries from which he died the same day. He had been previously requested by the ship's mate, a superior officer, to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch. The reasons for his disregarding said request are not known, although it may be surmised that he did so in order to obtain the sling in which said coal had been placed for the purpose of using it to discharge some waste and scrap wood on the deck to the dock, an act permitted by the employer; that the act of bringing said coal on board was within the general scope of his duties in that it was part of his work to direct the winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said direction of the mate was an act of minor disobedience in the course of his work and not an act taking himself outside

the scope and course of his employment; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the average weekly earnings of the employee herein at the time of his injury amounted to \$59.58; that the reasonable expense of the burial of the said employee was over \$200.00; that claimant has paid thereon \$100.00; that there is still due to the Funeral Director providing said burial service McNerny's Mortuary the sum of \$166.00 thereon and therefor defendants are liable to claimant in said sum of \$200.00 payable in the said sum of \$166.00 on her account to McNerny's Mortuary and the balance of \$34.00 to claimant; that Anna Anderson, Claimant herein, born September 1st, 1892, widow of said employee, was living with him and supported by him [8] at the time of his death and is entitled to a death benefit at the rate of \$13.13 a week, payable in installments either each two weeks or monthly at her election beginning November 30th, 1947, until the further order of the Deputy Commissioner, subject to the limitations as to maximum payment and period of payment contained in said Act, amount accrued to and including February 24th, 1948 12-3/7 weeks is \$163.19 no part of which has been paid; that claimant's attorney Grover Johnson, has rendered legal service to claimant in the prosecution of her claim for which a fee is approved in the sum of \$125.00 and lien is granted therefor upon compensation awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, Burns Steamship Company, and the insurance carrier, Associated Indemnity Corp., shall pay to the claimant compensation as follows:

The sum of \$200.00 forthwith upon the burial expense, payable \$166.00 to McNerny Mortuary on her account, and \$34.00 to claimant.

To claimant the sum of \$163.19 forthwith as of February 24th, 1948 and the further sum of \$13.13 weekly thereafter, payable in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner, subject, however, to a lien therein in favor of the claimant's attorney Grover Johnson in the sum of \$125.00, payable directly to said attorney.

Given under my hand at San Francisco, California, this 27th day of February, 1948.

(Signed) WARREN H. PILLSBURY
Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

WHP:MI

[Endorsed]: Filed Mar. 23, 1948. Edmund L. Smith,
Clerk. [9]

[Title of Court and Cause]

NOTICE OF MOTION TO DISMISS COMPLAINT
OR FOR SUMMARY JUDGMENT AND MO-
TION TO DISMISS COMPLAINT OR FOR
SUMMARY JUDGMENT AND MEMORAN-
DUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS COM-
PLAINT OR FOR SUMMARY JUDGMENT

To: The Plaintiffs above named and to Cyril S. Tipton
and Patrick H. Ford, their attorneys:

You and Each of You Will Please Take Notice that the
undersigned will bring the above motion on for hearing
before the above entitled Court in the Courtroom of the
Honorable Ben Harrison, United States District Judge,
in the United States Post Office and Court House Build-
ing, 312 North Spring Street, Los Angeles 12, California,
on Monday, the 23rd day of August, 1948, at 10:00
o'clock in the forenoon of that day or as soon thereafter
as counsel can be heard.

Dated: This 7 day of August, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Asst. U. S. Attorney

Chief of Civil Division

By Leila F. Bulgrin

Asst. U. S. Attorney

Attorneys for Defendant, Warren H. Pillsbury,
etc. [13]

MOTION TO DISMISS COMPLAINT OR FOR
SUMMARY JUDGMENT

Now comes the defendant, Warren H. Pillsbury, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, by his attorneys, James M. Carter, United States Attorney for the Southern District of California, Clyde C. Downing, and Leila F. Bulgrin, Assistant United States Attorneys for the Southern District of California, and move this Court to dismiss the complaint or for summary judgment for the following reason and ground:

I.

That the complaint filed in the above entitled case fails to state a claim upon which relief can be granted.

This motion is based and will be based upon the records, files, and pleadings herein and upon the Memorandum of Points and Authorities attached hereto.

Dated: This 7 day of August, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Asst. U. S. Attorney

Chief of Civil Division

By Leila F. Bulgrin

Asst. U. S. Attorney

Attorneys for Defendant, Warren H. Pillsbury,
etc. [14]

[Verified.]

[Endorsed]: Filed Aug. 7, 1948. Edmund L. Smith,
Clerk. [15]

Federal Security Agency—Bureau of Employees
Compensation

Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Claim No.

Case No. 3022-41

MRS. ANNA ANDERSON, Widow of John A. Ander-
son, Deceased,

Claimant,

vs.

BURNS STEAMSHIP COMPANY,

Employer,

ASSOCIATED INDEMNITY CORP.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before
Warren H. Pillsbury, Deputy Commissioner, Bureau of
Employees Compensation, Federal Security Agency, in
the Conference Room, Longshoremen's Dispatching Hall,
343 Broad Street, Wilmington, California, on Tuesday,
December 16, 1947, at 2:15 o'clock P.M.

Appearances:

Claimant present in person and represented by Grover
Johnson, Attorney at Law.

Defendants represented by Cyril S. Tipton, Attorney
at Law. Murray H. Roberts, Attorney at Law, appeared
for Aetna Insurance Company. [17]

* * * * *

Mr. Pillsbury: Hearing on my initiative, on the request of claimant's attorney, Mr. Grover Johnson, to take up the death of John A. Anderson on November 29, 1947, on the S.S. Daisy Gray. Claimant, Anna Anderson, is present in person and represented by Grover Johnson, Attorney at Law. Defendants S.S. Daisy Gray and Burns Steamship Company, with their insurance carrier, Associated Indemnity Company, represented by Mr. Syril Tipton, Attorney at Law. Defendant Aetna Insurance Company is represented by Murray H. Roberts, Attorney at Law.

Mr. Roberts: May I be excused then? I have exhibited to you and the counsel involved here the exclusion in the I.D. policy issued by the Aetna Insurance Company covering the operations of the S.S. Daisy Gray, and attached to that policy was an endorsement which excluded coverage which pertains to longshoremen's compensation or any employee or employer relationship excepting members of the crew, and I would like to be dismissed. I suppose there is no claim against the Aetna people at this time.

I will see to it that the proper notification is sent to you, Mr. Pillsbury, about the insurance certificate which has heretofore been filed.

Mr. Pillsbury: The explanation of the inclusion of the Aetna Insurance Company is that when I received Mr. Johnson's letter in my office a search was made in my insurance file, [18] containing card certificates of policies issued under the Longshoremen's and Harbor Workers' Compensation Act. This showed a card certificate that the employer of the ship at the time of the injury herein involved was insured in the Aetna Insurance Company.

The employer's first report, which however is privileged against introduction in evidence, showed the Associated Indemnity Company as the insurance carrier and I did not discover a card certificate of the insurance from this carrier.

However, Mr. Tipton, you are willing to stipulate, as I understand, that the Associated Indemnity Company was the insurance carrier of the S.S. Daisy Gray and owners, Burns Steamship Company, managing owners, on and about November 29, 1947, under the Longshoremen's and Harbor Workers' Compensation Act, are you?

Mr. Tipton: That is right.

Mr. Pillsbury: And you do not claim that the Aetna Insurance Company was also the insurance carrier?

Mr. Tipton: I have no information to the effect that they are.

Mr. Pillsbury: Then Mr. Roberts, I will drop the Aetna.

Mr. Roberts: And I will notify the Aetna to clear your records on that insurance. May I be excused?

Mr. Pillsbury: Yes.

Claim for death benefit is filled out by Mr. Johnson for [19] claimant, signed by her, oath taken before me, received and ordered filed. Mr. Tipton, are you satisfied to proceed today to hearing on the claim?

Mr. Tipton: Yes, I think so.

Mr. Pillsbury: Ten days notice is therefore waived.

(Discussion off the record.)

Mr. Pillsbury: Pre-hearing conference has been held which indicated that the defendants would not accept liability without hearing, relying on issues previously raised in a controversion notice filed with me and dated December 8, 1947, raising the grounds of, first, degree

of dependency, and second, whether the injury arose out of and occurred in the course of employment.

The following facts are agreed to by the parties:

1. John A. Anderson, husband of the claimant herein, was in the employ of defendant S.S. Daisy Gray and owner Burns Steamship Company, at San Pedro, California, on and about November 29, 1947, as the winch driver and hatch tender, and at said time said employer was insured against liability under the Longshoremen's and Harbor Workers' Compensation Act by insurance in defendant Associated Indemnity Company.

2. That he met with fatal injury on said date on said vessel.

3. That the claim is within the provisions of said Act.

4. Medical treatment was not required. [20]

5. Defendants had actual knowledge of the occurrence of said fatal injury at the time thereof.

6. That the wages of the said employee at said time were over \$37.50 a week, the actual amount to be fixed by wage statement which is now received in evidence as Exhibit A.

7. That no compensation has been paid.

8. That death resulted the same day.

Mr. Anderson, you have stated in your verified claim that the amount of the undertaker's bill for the burial of your husband was \$416.00, is that correct?

The Claimant: Yes.

Mr. Pillsbury: And \$150.00 was paid on the bill by the union?

The Claimant: Yes.

Mr. Pillsbury: And you paid \$100.00 on the bill, did you?

The Claimant: Yes.

Mr. Pillsbury: And the balance of \$166.00 is still owing by you?

The Claimant: Yes.

Mr. Pillsbury: All right.

Mr. Tipton: Where was the burial?

The Claimant: McNerny, on 5th Street, McNerny's Mortuary, 5th Street.

Mr. Pillsbury: Claimant exhibits a marriage certificate and an interim marriage certificate, both dated the same day, [21] which are inspected by defendants and returned to claimant.

Mrs. Anderson, I will take your testimony and I will swear you again.

MRS. ANNA ANDERSON,

claimant, being first duly sworn, testified as follows:

Mr. Pillsbury: Q. Your name is Anna Anderson?

A. Yes.

Q. Speak so we can all hear. And you live at 542 West 3rd Street, San Pedro?

A. I do; renting there.

Q. According to your verified claim you were married to John Anderson on May 21, 1941 at Yuma, Arizona? Is that correct?

A. Yes.

Q. Is that the John Anderson who died on the 29th of November, 1947?

A. Yes.

Q. And are you the person named in the marriage certificate as Anna H. Koehler?

A. Yes, I was a widow at that time.

Q. You are the person who married Mr. Anderson under the name of Anna H. Koehler?

A. Yes.

Q. Was there any divorce or separation afterwards?

A. I was a widow. [22]

Q. Were you living with him at the time of his death?

A. I was.

Q. There were no children of the marriage?

A. No.

Mr. Pillsbury: Any questions, Mr. Johnson?

Mr. Johnson: Q. At the time of Mr. Anderson's death you were wholly dependent upon his support?

A. Yes.

Mr. Pillsbury: The fact of living together creates a conclusive presumption of dependency.

Mr. Tipton, any questions?

Mr. Tipton: Q. How had your prior marriage been terminated?

A. I was a widow at the time I married Mr. Anderson.

Q. Had your previous husband died, or were you a widow by virtue of divorce?

A. No, he had died.

Q. What was his name?

A. Albert W. Koehler.

Q. That was Koehler? A. Yes.

Q. And where did he die?

A. He died here in Wilmington.

Q. When?

A. The latter part of January, was it 1935?

Mr. Anderson: 1935. [23]

Mr. Johnson: Let the witness testify. That is the son.

Mr. Pillsbury: Yes, she is the witness.

Mr. Tipton: Q. Do you know whether John A. Anderson had been married before?

A. No, he was not.

Mr. Tipton: I think that is all.

Mr. Pillsbury: Now, Mr. Tipton, what is your contention with reference to the question of course of employment?

Mr. Tipton: Our contention is that at the time this accident happened Mr. Anderson had taken upon himself to order a certain sling of coal thrown on board for the purpose of releasing that sling to be used in the unloading of lumber scraps from the deck to the dock for a Mrs. Hamilton, and that he was instructed that could not be done, and the unloading of this lumber was not a part of his duties and was in the course of his trying to unload this lumber for Mrs. Hamilton.

Mr. Pillsbury: Will you take the next chair, Mrs. Anderson, please? Mr. Johnson, have you any witnesses?

Mr. Johnson: No, I did not bring any. I did not anticipate this defense.

Mr. Pillsbury: I will give you as much more time as you wish to complete your evidence.

There are some eye witnesses present apparently. Call any eye witnesses, Mr. Tipton. [24]

Mr. Tipton: Am I to understand that the applicant's case is closed, or are they to have the opportunity of producing further testimony?

Mr. Pillsbury: To have the opportunity of producing further testimony. The applicant is apparently taken by surprise by the nature of the issue raised.

Mr. Tipton: I do not think so for the reason he was served a copy of our notice of contention which set forth that would be one of the issues.

Mr. Johnson: I never received such a notice. This is the first I have heard anything about it.

Mr. Pillsbury: Nevertheless I wish to get to the bottom of the question and get the facts.

Mr. Tipton: I am not sure; I thought it had, but I have no note to show whether it was or was not. I am not making any assertion you got a copy. Mr. Bliss.

ERNEST L. BLISS,

being first duly sworn, testified as follows:

Mr. Pillsbury: Q. What is your name?

A. Ernest L. Bliss.

Q. Your address?

A. 1924 Caspian Avenue.

Q. What city? A. Long Beach.

Q. What is your occupation? [25]

A. Master, steam vessels.

Q. Were you the master on the S.S. Daisy Gray?

A. Chief mate. That is my rating, master.

Q. Were you the chief mate on the Daisy Gray at that time? A. Yes, I was.

Q. Did you know Mr. John Anderson?

A. Fairly good, yes.

Q. Did you see him sustain any injury on that date?

A. Yes.

Q. What did you see?

A. I saw him directly hit. I was just astern of him, saw him get hit with a load of coal.

Q. What hit him?

A. A sling load of coal.

Q. What was being done with it?

A. Being swung from the gangway to #2 hatch along the areaway on the port side.

Q. What was being swung?

A. The coal was swinging down the areaway toward Mr. Anderson at the time he got hit.

Q. Was that being loaded into the ship or taken out of the ship?

A. Being loaded into the ship, yes, from the dock into the ship.

Q. Yes. Then what happened to Mr. Anderson? [26]

A. Well, the load of coal hit him in the back of the head. It looked to me, I was astern of him, it spun him around and he landed on the coal by holding onto the coal.

Q. And did anything more happen?

A. No, that is all there was. Then we phoned for the ambulance.

Q. Was he unconscious after he was hit?

A. He was unconscious. I took his pulse and felt his heart, and got a blanket. That was all I could do. He was unconscious after it hit him.

Q. What was his occupation at that time?

A. Longshoreman winch driver.

Q. And it is the custom, is it not, that the winch driver and hatch tender shall change positions hour by hour?

A. Yes.

Q. What position was he occupying?

A. Hatch tender.

Q. Had he given the signal to raise the sling load of coal and place it aboard?

A. Yes.

Mr. Pillsbury: Mr. Tipton.

Mr. Tipton: Q. Mr. Bliss, did you have a conversation with Mr. Anderson some time before this incident occurred?

A. Yes, I did.

Q. Where was that? [27]

A. Just approximately the same location where he got hit.

Q. About how long was it before the accident happened?

A. Perhaps maybe seven or eight minutes, something like that.

Q. What was said in that conversation?

Mr. Johnson: We object to any conversation as hearsay and in the nature of evidence we are not in a position to meet.

Mr. Pillsbury: Objection overruled.

A. He asked me if he could use the sling that was on the dock—no, he asked first if I had an extra sling, a net sling, and I said no, the only sling there was on the ship was the one that was loaded on the dock at #2 with coal.

Mr. Tipton: Q. Go ahead.

A. So I told him that was the only one that was the one loaded with coal on the gangway by #2, so he says we will bring the coal on board. And I says, no, we cannot do that with the No. 1 gear because we have to take that on the starboard side, and it was portside to the dock, because the place where we load the coal is on the starboard side. We take some on the deck, and take some aloft on the saloon deck.

Mr. Pillsbury: Q. What was your position at that time? A. Beside him at the dock.

Q. Your position? A. Chief mate.

Q. Of the Daisy Gray? [28] A. Yes.

Q. As such, what relationship of employer did you bear to Mr. Anderson? Was he working under your direction? A. Yes.

Mr. Pillsbury: Go ahead.

A. All right. So he asked why he couldn't take the load on board with the #1 gear and I explained it had to go on the starboard side, and I told him that the sailors

would take it on board with the #2 gear, which was idle, when they got through with the #3 gear.

Q. Which gear was Mr. Anderson working at?

A. #1. The #2 for the coal was laying idle and was winged in and could not be used without winging it out to bring any kind of a load in.

Q. Go ahead.

A. So after several minutes we were talking, we were not talking any further about the coal, he and I were talking about the trip, talking idly, and then I went aft. I went to #3 to check on the amount of lumber that was out, and I came back up.

Q. You have finished the conversation? A. Yes.

Mr. Tipton: Q. In that conversation was anything said about why he wanted to use that sling?

A. Yes, he wanted to do a favor, more or less, to a wife [29] of a man in the galley so she could take some random pieces of lumber in the slingload for her fireplace, and he was doing her a favor by trying to get a net sling to get the lumber off.

Q. Where was that lumber, on the deck?

A. On #2.

Q. On the ship? A. Yes.

Q. Do you know whether or not her name was Mrs. Hamilton? A. That is it.

Q. Subsequent to that conversation did you see the coal coming aboard?

A. Not until after I started walking forward again, which is just as the coal was being swung. I was almost there.

Q. And between the time you had talked to Mr. Anderson and told him that he could not swing this coal aboard, had you had any further conversation with him about it?

Mr. Johnson: We object to the question, misstatement of the question. There has been no testimony on the part of the witness he could not do it.

Mr. Tipton: Q. Subsequent to the conversation you had with Mr. Anderson about the movement of the coal which was in the sling, between that conversation and the time you saw it coming aboard, did you have any other conversation with Mr. Anderson? [30]

A. Not a bit.

Q. Now what, in your ordinary procedure, would have happened to that lumber which was to be taken by Mrs. Hamilton?

Mr. Johnson: We object to this. We are going to ordinary procedure, something hypothetical here, not material.

Mr. Pillsbury: You were in charge of the loading and unloading operations on the ship, were you?

A. Yes.

Mr. Pillsbury: Objection overruled.

Mr. Tipton: Q. Did you understand the question?

A. No.

Q. In the ordinary practice of the vessel what would have been done with this lumber on the deck that Mr. Anderson was going to swing to the dock for Mrs. Hamilton?

A. On ordinary practice it would have been carried over and loaded on #1 and taken by hand over to where—

Mr. Pillsbury: It was to be removed from the ship to the dock?

A. Yes, sir. That is right, between #1 and #2. They were little pieces of random lumber laid in between the hatches.

Mr. Tipton: Q. Now what is the custom insofar as loading and unloading ship's stores or anything of that type is concerned? Is that done by the longshoremen or by the crew? A. Done by the crew.

Q. And the longshoremen work only with cargo? [31]

A. That is right. That is strictly up to the company. There has been a little jurisdictional, a little dispute. The company has the right to hire longshoremen any time to take on stores, but under normal practice unless they state so it is to be taken aboard by the seamen. They only use that practice when they are taking on stores for four months or something like that.

Q. In the ordinary practice would this lumber have been taken from the deck to the dock by the crew or longshoremen?

Mr. Johnson: We will object to this testimony, ordinary practice or custom. The witness admits there is a dispute about it.

Mr. Pillsbury: Objection overruled.

Mr. Tipton: You may answer the question.

A. Would that lumber—it would stay on board or be given to somebody or be thrown over the side.

Mr. Pillsbury: The question was whether it would be taken off by the longshoremen or by the crew?

A. That is open to dispute. If some longshoreman or sailor asked me for it, it is just more or less a give-away of something that was not of any use.

Mr. Tipton: Q. Was there any custom as far as unloading it from the vessel?

A. It would only be the crew alone that would be throwing things overboard. [32]

Mr. Pillsbury: Q. It was to be taken off the vessel in any event? A. In time, yes, excess trash.

Mr. Tipton: Q. Would it have been taken off necessarily and put on the dock?

A. It might have been taken off at sea.

Mr. Pillsbury: Q. Might it have been taken off at the dock?

A. There is no common practice. If there is trash you throw it over or if someone wants it you give it to them. If no one wanted it then the sailors would throw it over the side at sea.

Q. And you worked two men on a hatch, one operates the winch and one is the hatch tender?

A. Hatch tender.

Q. Who was the winch driver at this time?

A. Henry Tornquist.

Q. Did you ever give him any instructions to bring that coal aboard? A. Never.

Mr. Tipton: You may cross-examine.

Mr. Johnson: Q. You didn't give orders for every sling load, did you?

A. No, I did not. We always have the two winch drivers working together.

Q. In other words, you indicate what goes on or off? [33]

A. The lumber that goes off is strictly up to them as long as they do not take more or less of some cargo than is supposed to go out, then I will stop them. The size of the load is jurisdictional.

Q. Coal was actually cargo that was to be taken on board the vessel and carried away?

A. Not cargo; stores, yes.

Mr. Pillsbury: Q. It was a commodity to be loaded on the ship, was it?

A. Commodity to be loaded aboard the ship as stores, yes.

Mr. Johnson: Q. Mr. Hamilton works on the Daisy Gray?
A. Yes, he does.

Q. In the galley, kitchen? A. Yes, galley.

Q. And Mr. Anderson told you that Mrs. Hamilton wanted some wood for her fireplace?

A. I will tell you how it came about. The day before he had been helping Mr. Hamilton take this lumber for Mrs. Hamilton, and he was fairly good friends with Mr. Anderson. The following day when he was looking—

Q. You were not an enemy of Mr. Hamilton?

A. Not a bit.

Q. So you raised no objection to Mrs. Hamilton getting the lumber?

A. No, I would like to see her have it. [34]

Q. So that as to this lumber, Mr. Anderson having told you that Mrs. Hamilton wanted it, you would have seen that at some time before you left the dock that it was removed from the ship to the dock for Mrs. Hamilton?

A. Not necessarily on that question. I would say that if any person wanted to throw it on the dock, which was not very far away, they could have taken it any way they could get it, throwing it over the side or any other practice by which they could have had it in safety, and so forth. I would have been glad for them to have it.

Mr. Pillsbury: Q. Did you consent to Mrs. Hamilton getting it?

A. She had been taking it for one day and I consented to that.

Q. You were agreeable?

A. Certainly, and I gave some to some longshoremen that wanted it just to get rid of it. It was scrap, broken pieces and all odd sizes.

Mr. Johnson: Q. Mr. Anderson was putting the coal on the side where you indicated it was to go?

A. No, he certainly was not.

Q. It was being swung from one side of the vessel to the other side, wasn't it? A. No, no.

Q. The sling load hit Mr. Anderson before the coal was [35] actually dumped out of the sling?

A. Yes.

Q. How long had Mr. Anderson been working on the Daisy Gray that day before he was injured?

A. Say approximately, five days.

Q. Five days? A. Five days.

Q. And how long, maybe I should say on this particular shift, Captain Bliss, do you know?

A. Five days.

Q. On this particular shift?

A. Yes, I think we started at 7:00 o'clock and worked until 12:00, came back at 1:00, five hours is right.

Mr. Pillsbury: Q. What time was the accident?

A. Approximately 1:25, between 1:25 and 1:30.

Q. P.M?

A. One P.M., I would say 1:30 P.M.; when I talked to him at the beginning—

Mr. Pillsbury: All right.

Mr. Johnson: I believe that is all.

Mr. Pillsbury: Q. Mr. Bliss, the coal belonged to the ship? A. Yes.

Q. And was to be brought on board the ship some time? A. Yes, she was. [36]

Q. And it was in a sling on the dock awaiting its being lifted on board? A. That is right.

Q. But you preferred to have it brought in by a different winch at a different hatch?

A. At a different hatch, yes, and on a different side.

Q. That is, when it was landed you wanted it landed on which side? A. Starboard.

Q. Where was it at the time of Mr. Anderson's accident?

A. On the port side. It was on the dock, but it hit Mr. Anderson on the port side, the opposite side.

Q. Do you know definitely which side it would have landed on had there been no accident? A. Yes.

Q. Which side? A. Port side.

Q. Who owned the lumber in question, the scraps?

A. Just got there from the various loads for the last 24 years.

Q. Did it belong to the Burns Steamship Company or the Daisy Gray?

A. Daisy Gray you may say, yes. There were many years accumulation.

Q. What was the coal to be used for? [37]

A. For the galley fire.

Q. On the ship? A. Yes.

Q. Both Mr. Anderson and yourself were working for the Daisy Gray or for Burns Steamship Company?

A. Yes.

Q. Is there as much differentiation in the work in loading and unloading operations of crew and longshoremen where they are all working for the same employer as there is where the ship is being loaded or unloaded by contractor, stevedore contractor?

A. That will have to be answered by someone else. On a steam schooner the sailors always have one hatch, and on off shore ones the sailors do not do longshore

work, that is on the freighters and passenger boats. On the schooners the sailors do longshoring.

Q. Part of the loading and unloading is done by the ship's crew for the lumber schooners? A. Yes.

Q. Is there any interchange of crew and longshoremen on the Daisy Gray if occasion should occur, if they are short a man on either gang?

A. If it is impossible to get longshoremen but only in case it is impossible to get them.

Q. If it develops you do not have a seaman could you [38] use a longshoreman in the same hatch?

A. No.

Q. Why not?

A. That is just one kind where you do not do it. The sailors would work short-handed. With outside help you get—well, it has not been brought up for a number of years, but they would have to use somebody extra. They could call a longshoreman if he had seaman's papers to work in there; that is all; or maybe in an emergency they could use a longshoreman to work at a certain dock, but not when you went to sea.

Q. That differentiation you say is based on the hatches the men work? A. Yes.

Q. Is there as much differentiation with references to putting commodities on board or taking off?

A. #2 is the longshoremen's hatch; #3 is the sailor's, if that is what you are getting at.

Q. You say Mr. Anderson worked at #1 hatch?

A. Yes.

Q. At the time of the accident? A. Yes.

Q. And if there were some matters of ship's stores at #1 hatch, would there be any objection to the crew bringing them on board?

A. The sailors place on board all stores, that is it [39] would be strictly the sailors' place to bring them on board.

Q. Why?

A. Well, that is part of their duties and there is usually not enough stores for the longshoremen and the crew do it.

Q. Then the shore gang on lumber do bring such stores on board at times? A. Only in off shore ships.

Q. I understood you to say that if there were not enough stores to warrant a longshore gang the seamen would bring them on board? A. Yes.

Q. But if there were enough stores then longshoremen would do it?

A. It is up to the company whether they want to use them, and they will not do that unless it is stores for several months.

Q. What difference does it make?

A. In the first place they are paying longshoremen a premium upon the time they would have to work on the cargo. The sailors are working cargo for a smaller hatch and have much more time to bring them on board, besides not having to pay the wages they have to pay the longshoremen, difference in wages, for one thing.

Q. But if it is a small matter under the situation presented, does the custom still rigorously except the one sling? [40]

A. That would be strictly a sailor operation; they would never take a longshoreman.

Q. Who owned this sling on which this coal was being brought on board? A. The ship.

Q. How much discretion ordinarily is vested in the hatch tender as to what loads to bring on board?

A. Strictly—

Q. Do you stand there and point out each load?

A. The cargo in question is coming out and is built up by the hold man down below and he in turn instructs the winch driver which way to go to handle the gear to clear the men from danger down below, and pull the load out.

Q. The hatch tender is in immediate charge of the moving of the load? A. Yes.

Q. And ordinarily within some limits would he select what loads to move first?

A. No, not necessarily; in the loads we take two from one side and two from the other side. He knows two are coming from this side and then two from this side, so he instructs the winch driver.

Q. The hatch tender?

A. The hatch tender keeps in mind and instructs the winch driver so the lumber can come off evenly. If there is [41] any question the mate is usually around where he can call and ask him.

Mr. Pillsbury: Are there any other questions of this witness? That will be all. Next witness?

HENRY TORNQUIST,

being first duly sworn, testified as follows:

Mr. Pillsbury: Q. What is your name?

A. My name is Henry Tornquist.

Q. Your address?

A. 8132 West 1st Street, San Pedro.

Q. Your occupation? A. Longshoreman.

Q. Are you a winch driver-hatch tender?

A. Yes.

Q. And were you such on the 29th of November last?

A. Yes, I was driving winch at the time of the accident.

Q. You were driving winch on the Daisy Gray at the time of Mr. Anderson's accident? A. Yes.

Q. How did the accident happen?

A. The only thing I can say, he told me to pick up the load of coal. For myself I was sitting there driving winch, the coal she back there, and I pick up and swung around, and when the load swung back it dropped down. I did not see him.

Q. He told you to place the coal on board? [42]

A. Yes, cook's coal, cook uses in galley.

Q. Were you landing the load on the port or starboard side? A. Port side.

Q. Do you know why it was landed on the port side?

A. No, he just told me to pick up load.

Q. Did he give you any signal on which side to put it?

A. No, he says bring it.

Q. Why didn't you place it on the starboard side?

A. There was gangway there.

Q. Your testimony then is that it was physically impossible to place the load on the starboard side?

A. Yes, there was gangway there. I could not get over on the starboard side.

Q. Was the port side the inbound side?

A. Yes, the ship was heading northeast and would be port side.

Q. The port side was next to the dock?

A. On the left side.

Q. Was the port side next to the dock? A. Yes.

Q. And you could not get this load over to the starboard side?

A. No, on account of the gangway there.

Mr. Tipton: Q. In your operations as winch driver, you followed the direction of the hatch tender? [43]

A. He told me what to do. If he drives then I tend hatch. We take hours.

Mr. Pillsbury: Q. Were you unloading at the time?

A. Yes, unloading lumber, low hold, #1 hatch.

Q. During the time you were unloading you brought this sling load of coal on board? A. Yes.

Q. Instead of coming back empty?

A. He told us to.

Mr. Tipton: Q. He told you to pick up the load of coal? A. Yes, the load of cook's coal.

Q. Just before he told you to bring this coal aboard had you seen him and Mr. Bliss talking?

A. Yes, they was talking after coal in #1 hatch.

Q. Could you hear that conversation?

A. No, it was too far away.

Q. Then right after that Mr. Anderson told you to bring the coal aboard?

A. Yes, I picked the coal up.

Mr. Tipton: I think that is all.

Mr. Pillsbury: Mr. Johnson?

Mr. Johnson: Q. At the time just before you picked up the coal, Mr. Tornquist, you had landed a load of lumber?

A. Yes, on the rooster; then I picked up the coal.

Q. You say from where you were sitting you could not see [44] Mr. Anderson when he was hit?

A. No, I was sitting when the coal went backward like that, I could not see nothing, and then I pick up a load and take a swing, only keep my eyes on the load to see where she was going (indicating).

Q. You say when you pick up a load of coal you keep your eyes on it?

A. Yes, on the lumber too, always face.

Q. You have loaded coal on lumber schooners before?

A. Yes, I took lots of cook's coal before.

Q. Had you loaded coal on board the Daisy Gray before? A. Oh, yes, off and on.

Mr. Pillsbury: Q. You were a longshoreman at the time, not a member of the crew?

A. No, longshoreman, winch driver.

Mr. Johnson: That is all.

Mr. Pillsbury: Q. Do you know where this coal was to be stowed?

A. I know. He never told me anything about it.

Q. Do you know where the coal was going?

A. Back aft, underneath #2 gear.

Q. Near the ship galley?

A. No, the ship is like this (indicating).

Q. Where is the coal after it is landed?

A. Underneath the #2 winch on starboard. [45]

Q. How does it get there after it is brought on board the ship?

A. You rig up #2 gear and take some aboard; leave some coal and take some on top deck.

Q. How is it carried up there?

A. Pull it up by the hands, got little rigging, pull it by hands (indicating).

Q. Is there any great difference in the final storage whether it is brought in at #1 or #2?

A. If he had done it safely we would have landed it by gear. We always took it out of #2 gear.

Q. You heard the testimony of the ship's mate that the crew always take coal aboard?

A. Sometimes the crew takes it aboard, sometimes the longshoremen, if the crew is busy with their hatch and the longshoremen get through before. Generally you take on board the ship stores with the longshore gang on board the ship if the sailors are behind.

Q. Were the sailors working hatch?

A. Yes, #3 at the back end.

Q. Was anybody working at #2?

A. No, they were all through.

Q. Who had worked at #2 last?

A. Longshoremen.

Q. Was it much more unhandy to move the coal from #2 to [46] #1?

A. You load all stores, or baggage, land it.

Q. Was it handier to get it back to the galley from #2 hatch, than from #1?

A. If he took it as we handled it and took it aboard and laid the load on the four-wheeler.

Q. By four-wheeler you mean a little truck?

A. Four wheels. A little buggy they load lumber on.

Q. What I am trying to get at is whether the coal was landed at #2 or #1, would it still be moved back on a four-wheeler?

A. No. The only way to handle the load is to take it over the side on the starboard. The load was lying on the port side, and the coal is supposed to go on the starboard. The only way to get it was to pack it to #2 gear and to place it on starboard side. This is the port side. This is starboard side (indicating).

Q. Did Mr. Anderson tell you how he was going to get the coal from #1 gear over to #2?

A. No, he told me to pick up and swing.

Q. Do you know how he was going to get it over?

A. The only way we could, with a fore and aft swing.

Q. With #1 gear? A. Yes.

Q. Could it be swung back to #2 gear with #1 gear? [47]

A. No. The load was so low down if I swing back it would tear the hatch off.

Q. After that coal got where it landed by #1 gear, how could it have been moved back to where it was going to be laid? A. Wait for the sailors to rig the gear.

Q. You have to rig #2 gear?

A. Yes. So when the load was landed the sailors took it over to the starboard side.

Q. With #2 gear?

A. Yes. So I do not see the reason why he lifted the coal myself.

Q. Now it was still in the sling at the time?

A. Oh, yes, the fellow brought it.

Q. If it were taken out of the sling how would it be handled?

A. Have to put it on the ropes then.

Q. I do not quite get the picture yet.

A. He could have dumped the coal on the dock and took it on the ropes.

Q. The coal was in a sling on the dock?

A. Yes.

Q. And it could have been picked up by #1 or #2 gear? A. Yes.

Q. But there was nobody at #2 gear at the time?

A. No, sir. [48]

Q. Could it have been picked up by #3 gear?

A. Yes, but they have to take it back and roll it forward.

Q. Would the boom from #3 reach that coal on the dock? A. Not the boom, wing.

Q. #3 boom could not have reached it?

A. No, no, #3 gear.

Q. So the sling load of coal on the dock could not have been reached by the #3 gear? A. No.

Q. Only by #1 or #2? A. Yes.

Q. Could it have been reached at the time by both #2 or #1?

A. You can reach it with #1 and #2, yes. We use the #1.

Q. How long would it take to rig up #2 gear?

A. Maybe 20 minutes.

Mr. Pillsbury: Mr. Johnson, any questions?

Mr. Johnson: Q. Ordinarily you would have picked that load of coal up on the dock and laid it down when you got the signal to lay it down? A. Nobody—

Q. You had not got his signal yet? A. Yes.

Q. You were moving it over prior to the time you laid it down when Mr. Anderson got hit? [49]

A. You swing it this way and then back, when that went back there I did not see him (indicating).

Mr. Pillsbury: Q. If the coal were to be landed on the port side of the deck by your #1 gear, could it have been picked up by #2 gear? A. Yes.

Q. #2 could reach it from the deck of the ship?

A. Yes, they picked up and brought it over the star-board side,

Q. You don't know whether you were just going to set it on the deck and leave it in the sling so #2 could pick it up, or whether you were going to dump it out of the sling?

A. No, I do not know what he was going to do with the sling.

Q. As I understand it, ordinarily if you are going to dump a sling of coal you would land and then unhook one side and you pull the sling out from under it?

A. Yes.

Q. Or can you take out your hooks and leave the coal on the sling? A. Yes.

Q. If you had done that you could come along with #2 winch and pick up your sling and move it?

A. Oh, yes, if #2 gear was rigged up you would not need to pull around with #1 gear.

Q. It was not rigged up? [50]

A. No, the boom was like this (indicating).

Q. Was there any other way of getting the coal back to where it was to be stowed except by using #1 or #2 gear? A. Put on the shoulders and pack.

Q. Was there anybody who could pick it up and pack it?

A. No, only the mate there, except the gang up from the hold, the sailors.

Mr. Pillsbury: All right.

Mr. Tipton: That is all.

Mr. Johnson: Q. You were winding up the job?

A. Yes.

Q. You had the boat loaded?

A. Well, we had about four hours left. After he was killed we worked until 4:00 o'clock, and that was at 1:30, something like that.

Mr. Johnson: That is all.

Mr. Pillsbury: That is all.

Mr. Tipton: I will recall Mr. Bliss for just one question.

ERNEST L. BLISS,

having been previously duly sworn, testified as follows:

Mr. Tipton: Q. Mr. Bliss, in order to put that coal where it belonged it would have been necessary to have rigged #2 regardless of whether the coal was on the dock or the vessel?

A. Unless you wanted the sailors to pick it up and carry it from #1 to #2, over to the starboard side. [51]

Q. What was your intention insofar as loading this coal was concerned?

A. I intended to take the sailors after they finished #3 and wing it out with #2 gear.

Mr. Pillsbury: Q. How does the coal get back from the offshore spot?

A. It is taken by the sailors with the gear from the dock, #2 gear, over to the starboard side, then some is unloaded by the sailors by hand and carried a few feet on the platform, and some is taken by the hand billy about 15

feet hand over hand to the saloon deck, about 18 sacks. We take half and half for the saloon deck and in the galley; that is common practice.

Mr. Pillsbury: Are there any other questions?

Mr. Tipton: That is all.

The Witness: I would like to say one more thing. The longshoremen, as he stated, do sometimes occasionally hook onto something and bring it on board ship but when they bring it on board they land it, but the sailors always take it and store it. The sailors will finish storing it; they only bring it on board the ship.

Mr. Tipton: No further questions.

Mr. Pillsbury: Mr. Johnson?

Mr. Johnson: No.

Mr. Pillsbury: All right. [52]

Mr. Tipton: May Mr. Bliss and Mr. Tornquist be excused.

Mr. Pillsbury: Yes. Next witness?

Mr. Tipton: That is all we have.

(Discussion off the record.)

Mr. Johnson: I would like two weeks, Mr. Pillsbury.

Mr. Pillsbury: Do you want another hearing, Mr. Johnson?

Mr. Johnson: Yes. I do not wish to close at this time.

Mr. Pillsbury: Shall I definitely reset it now? I will be here again in four weeks.

Mr. Johnson: I would like it set when you are here.

Mr. Pillsbury: Continued for four weeks, or thereabouts, to my next trip to Wilmington. That will be all for today.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on December 16, 1947.

HELEN G. SCHULKE,

Reporter [53]

EXHIBIT A

[Crest]

ASSOCIATED INDEMNITY CORPORATION

111 West Seventh Street Los Angeles 14, California

Head Office: San Francisco

Employer John A. Anderson Injured.....

Date last worked November 29, 1947 Date of accident November 29, 1947

registered long- (\$1.57 Per hour
Injured was ~~Steady~~ shoreman em- (\$..... Per day
~~Extra~~ ployee working (\$..... Per week
at the rate of (2.355 O. T.

Number of days constituting a working week 5

Number of hours constituting a working week 40

Dates injured was employed by you: From.....,
19....., to....., 19.....

Note: If injured's wages varied in amount from week to week, complete the following report of 52 weeks' earnings.

Week Month				Number
Week	From	To	Amount	of days
No.	Date	Date	Paid	worked
	December '46	November '47		
1				
2	December		494 46	
3	January		428 57	
4	February		187 20	
5	March		329 18	
6	April		372 11	
7	May		224 70	
8	June		225 03	
9	July		379 14	
10	August		206 45	
11	September		326 28	
12	October		125 29	
13	November 29th		318 72	
*	*	*	*	*

Total Carried Forward \$3,617 13

[Written]: 12-11-47 [Illegible]

* * * * * * *

I certify that the above is a true copy of payroll record of Injured's earnings as shown on Employer's records.

Signed WATER FRONT EMPLOYERS
ASSN.

By Gary S. Banos

Supervisor of Records Department [54]

[Written]: Filed 12-23-47 M. L.

[Stamped]: Received Dec 23 1947 District No. 13.

[Endorsed]: 8075-BH. Filed Aug. 7, 1948. Edmund
L. Smith, Clerk. [55]

[Title of District Court and Cause]

NOTICE OF MOTION FOR SUMMARY JUDG-
MENT FOR PLAINTIFFS AND MOTION FOR
SUMMARY JUDGMENT AND POINTS AND
AUTHORITIES

To Johnson & Kaplan, 704 S. Pacific Ave., San Pedro,
Calif., as Attorneys for Defendant Anna Anderson:

To James M. Carter and Leila F. Bulgrin, as Attorneys
for Defendant Warren H. Pillsbury:

You and Each of You Will Please Take Notice that
plaintiffs will move the Court for summary judgment,
pursuant to Rule 56, F. R. C. P., before the Hon. Ben
Harrison, Judge, in his courtroom at 312 N. Spring St.,
Los Angeles 12, on Tuesday, September 7, 1948, at 10
a. m. or as soon thereafter as counsel can be heard.

Dated: August 17, 1948.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiffs. [56]

MOTION FOR SUMMARY JUDGMENT

Now come the plaintiffs, by their attorneys Syril S. Tipton, Esq. and Patrick H. Ford, Esq., and move the Court for Summary Judgment for plaintiffs and against defendants and each of them, for the following reason, to wit:

I.

That defendants have, and each of them has, no defense upon the merits to said action and it is clear on the record that the award is against the law.

This motion will be based upon the records, files, and pleadings herein and upon the Memorandum of Points and Authorities annexed hereto and the Memorandum of Points and Authorities filed by plaintiffs in opposition to defendant Pillsbury's motion to dismiss or for summary judgment.

Dated: August 17, 1948.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiffs. [57]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 18, 1948. Edmund L. Smith,
Clerk. [58]

[Title of District Court and Cause]

STIPULATION

It is hereby stipulated by and between the above named parties by and through their respective counsel that the Transcript of Testimony at Hearing heretofore filed in the records of this case on August 7, 1948, shall be deemed to be a part of both the Plaintiffs' Motion for Summary Judgment filed August 18, 1948, and the Defendant's Motion to Dismiss or for Summary Judgment filed on August 7, 1948.

Dated: This 20 day of August, 1948.

SYRIL H. TIPTON and
PATRICK H. FORD

By Patrick H. Ford
Attorneys for Plaintiffs
and

JAMES M. CARTER
United States Attorney
CLYDE C. DOWNING

Asst. U. S. Attorney
By Leila F. Bulgrin
Asst. U. S. Attorney
Attorneys for Defendant, Warren H. Pillsbury.

It is so ordered.

BEN HARRISON
United States District Judge.

[Endorsed]: Filed Aug. 20, 1948. Edmund L. Smith,
Clerk. [59]

[Title of District Court and Cause]

STIPULATION FOR CONTINUANCE AND RE
TRANSCRIPT

It Is Stipulated that the plaintiff's motion for summary judgment, heretofore set for September 7, 1948, may be continued to or reset for Monday, September 13, 1948, at 11 a. m. in the Courtroom of Judge Harrison.

It Is Further Stipulated that the Transcript of Testimony at the hearing before defendant Pillsbury, heretofore filed, shall be deemed a part of plaintiffs' motion for summary judgment.

Further notice of said hearing is waived.

Dated: August 20, 1948.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford
Attorneys for plaintiffs.

JOHNSON & KAPLAN

By Harry A. Kaplan
Attorneys for Def't Anderson.

JAMES M. CARTER and
LEILA F. BULGRIN

By Leila F. Bulgrin
Attorneys for Def't Pillsbury.

It is so ordered.

Date: Aug. 26, 1948.

BEN HARRISON

Judge.

[Endorsed]: Filed Aug. 26, 1948. Edmund L. Smith,
Clerk. [60]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 8075-BH Civil

BURNS STEAMSHIP COMPANY, a corporation,
et al.,

Plaintiffs,

vs.

WARREN H. PILLSBURY, etc., et al.,

Defendants.

JUDGMENT

The Motion of plaintiffs for Summary Judgment and the Motion of Defendant, Warren H. Pillsbury, for summary judgment or to dismiss having come on regularly before the Court on September 13, 1948, to be heard and the court having denied the plaintiffs' Motion for Summary Judgment and granted the Motion of the defendant, Warren H. Pillsbury, for Summary Judgment, it is therefore, this 1st day of October, 1948,

Ordered, Adjudged and Decreed that the plaintiffs' Motion for Summary Judgment is denied, and the defendant, Warren H. Pillsbury's Motion for Summary Judgment is hereby granted, and plaintiffs take nothing by way of their Complaint.

BEN HARRISON

United States District Judge.

Judgment entered Oct. 1, 1948. Docketed Oct. 1, 1948. Book 53, page 116. Edmund L. Smith, Clerk; by C. A. Simmons, Deputy.

[Endorsed]: Filed Oct. 1, 1948. Edmund L. Smith, Clerk. [61]

United States District Court
Southern District of California
Central Division

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Syril S. Tipton and
Patrick H. Ford, Esqs.
Attorneys at Law
210 West 7th St., (Room 907)
Los Angeles 14, California

Johnson and Kaplan, Esqs.
Attorneys at Law
704 South Pacific Ave.
San Pedro, California

James M. Carter, Esq.
United States Attorney
(Attn: Leila F. Bulgrin, Asst.)
600 Federal Bldg.
Los Angeles 12, California

Re: Burns Steamship Co., a corp., et al. v.

Warren H. Pillsbury, etc., et al., No. 8075-BH

You are hereby notified that Judgment has been entered
this day in the above-entitled case, in Judgment Order
Book No. 53, page 116.

Dated: Los Angeles, California, October 1, 1948.

EDMUND L. SMITH

Clerk

By C. A. Simmons

Deputy Clerk [62]

[Title of District Court and Cause]

NOTICE OF APPEAL BY PLAINTIFFS

Notice is hereby given that the plaintiffs Burns Steamship Company, a corporation, and Associated Indemnity Corporation, a corporation, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the judgment entered October 1, 1948, in Judgment Order Book No. 53, page 116, and from the orders made on September 13, 1948, denying the plaintiffs' motion for judgment and granting the defendant Pillsbury's motion for judgment.

Dated: November 5, 1948.

SYRIL S. TIPTON

TIPTON & WEINGANG and

PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiffs and Appellants

[Endorsed]: Filed & mld. copy to Jas. M. Carter, U. S. Atty., et al., Attys. for Defts., Nov. 5, 1948. Edmund L. Smith, Clerk. [63]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain full, true and correct copies of Complaint for Injunction; Answer of Defendant Anna Anderson; Notice of and Motion to Dismiss or for Summary Judgment of defendant Pillsbury; Transcript of Testimony at Hearing before the Commissioner; Notice of and Motion for Summary Judgment of Plaintiffs; Stipulations and Orders filed August 20 and 26, 1948 respectively; Judgment; Notice of Entry of Judgment; Notice of Appeal and Designation of Record on Appeal which, together with copy of reporter's transcript of proceedings on September 13, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$14.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13th day of December, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, September 13, 1948.

Appearances:

For the Plaintiffs: Cyril S. Tipton and Patrick H. Ford.

For the Defendants Pillsbury, etc.: Clyde C. Downing and Leila F. Bulgrin, Assistant United States Attorneys.

For the Defendant Anna Anderson: Johnson and Kaplan.

Los Angeles, California, September 13, 1948,
10:00 O'clock A. M.

The Court: This is a motion for summary judgment. I feel the matter is entitled to a liberal interpretation. In the last 10 or 12 years there has been a definite tendency toward liberality in such an interpretation, to take care of the injuries in industry. As I understand the claim, it was not in the course of his employment but apparently one of your main points as to the sufficiency of the evidence is that he was using a different instrumentality than he was requested to use. I therefore feel that it was outside of his employment.

Mr. Ford: He was using the instrumentality he was to use, but using it for his own purposes.

The Court: The Commissioner found that he was requested not to do so. He was not ordered to do so.

Mr. Ford: The Commissioner found that it was a disobedience.

The Court: I am going to interpret it liberally.

Mr. Ford: It is our contention that it is the purpose of the act—

The Court: I have examined the transcript. I think the Commissioner's findings are supported by the evidence. I don't think a set of facts such as appear here should deprive a workman of his compensation insurance. I don't think it [2*] was the intention of Congress to place matters on that strict a basis. The cases you cite are where he left the barge, the place of his employment. They are distinguished from this case. The motion of the defendant Warren H. Pillsbury for summary judgment is therefore granted.

*Page number appearing in original Reporter's Transcript.

[Endorsed]: Filed Dec. 9, 1948. Edmund L. Smith, Clerk. [3]

[Endorsed]: No. 12127. United States Court of Appeals for the Ninth Circuit. Burns Steamship Company, a corporation, and Associated Indemnity Corporation, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency and Anna Anderson, Appellees. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed December 14, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12127

BURNS STEAMSHIP COMPANY and ASSOCI-
ATED INDEMNITY COMPANY,

Plaintiffs and Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner,
13th Compensation District, Bureau of Employees Com-
pensation, Federal Security Agency, and ANNA AN-
DERSON,

Defendants and Appellees.

STATEMENT OF POINTS UPON WHICH APPEL-
LANTS INTEND TO RELY, AND DESIGNA-
TION OF RECORD TO BE PRINTED.

Come now the appellants and make the following state-
ment of points upon which they intend to rely upon this
Appeal, to wit:

1. The injury sustained by decedent John A. Ander-
son, which resulted in his death, did not arise "out of and
in the course of employment" within the meaning of 33
U. S. Code 902.

2. The violation of an employer's lawful order, by an
employee, for his own benefit or that of a stranger,
amounts to a "frolic and detour," which removes the em-
ployee from the course of employment.

3. Plaintiffs were entitled to Summary Judgment
against defendants and their motions should have been
granted.

4. Defendant Pillsbury's motion for Summary Judg-
ment should have been denied, and the said judgment
should be reversed.

DESIGNATION OF RECORD TO BE PRINTED

Appellants designate for printing the entire record to be filed in the United States Court of Appeals, except

* * * * *

Dated: December 10, 1948.

TIPTON & WEINGAND

By Cyril S. Tipton

Attorneys for Plaintiffs and Appellants.

Received copy of the within Statement of Points Upon Which Appellants Intend to Rely, and Designation of Record to be Printed, this day of December, 1948. James M. Carter, U. S. Attorney; Leila F. Bulgrin, Assistant; by Gertrude M. Johnson.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 14, 1948. Paul P. O'Brien, Clerk.

No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

APPELLANTS' OPENING BRIEF.

TIPTON & WEINGAND,

SYRIL S. TIPTON,

1220 Broadway Arcade Building, Los Angeles 14,

PATRICK H. FORD,

704 South Spring Street, Los Angeles 14,

Attorneys for Appellants.



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No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

Jurisdiction of the United States District Court in this case is clearly established by the allegation in the complaint that it arises under 33 U. S. Code 921, 44 Stat. 1436, 49 Stat. 1921 [Tr. 2].

Statement of the Case.

On November 29, 1947, the Burns Steamship Company was the employer of one John A. Anderson. As to liability under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1949 (33 U. S. C. A. 901-950), the employer carried insurance through the Associated Indemnity Corporation [Tr. 2, 3]. On said date, Mr. Anderson was working as a hatch tender and longshoreman on the S. S. Daisy Gray, afloat in navigable waters in Los Angeles Harbor [Tr. 7, 8]. An-

derson was giving signals to control use of the ship's winches [Tr. 8]. His immediate superior officer was the chief mate, Mr. Ernest L. Bliss [Tr. 8, 20, 22]. Just before the fatal accident occurred, Anderson asked Bliss for permission to use the sling on the dock which was then loaded with coal, by bringing the coal on board with the No. 1 gear, thereby freeing the sling so that he, Anderson, could do a favor for a Mrs. Hamilton, the wife of a man in the galley, using the sling to unload some scrap lumber for her fireplace [Tr. 8, 22-23]. The Chief Mate refused permission and explained that the coal had to be loaded on the starboard and that that work would be done by the ship's crew, with the No. 2 gear [Tr. 22-23]. (This conversation was somewhat ambiguously described in the Commissioner's findings both as a "direction" and as a "request," to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch [Tr. 8].)

Anderson disregarded the said direction (or "request") of his superior, and almost immediately gave a signal to bring the coal on board with the No. 1 winch [Tr. 33]. The mate had walked away from Anderson, and just as he was walking back, he saw the sling load of coal coming aboard [Tr. 23]. The load struck Anderson, and he sustained fatal injury, and died the same day [Tr. 8, 28].

Although the longshoremen occasionally loaded coal and other ship's stores [Tr. 8], the normal procedure was that the longshoremen had no connection with the loading of coal, except in an emergency, or when stores for several months' supply are being loaded [Tr. 29, 30, 31, 35, 36, 41]. It was physically impossible to load the coal safely

and properly with the No. 1 winch then in use, according to the longshoremen then actually operating the winch [Tr. 33, 35, 37]. Longshoremen's wages are an added expense to the employer, when they are directed to do work which the crew can normally perform [Tr. 31].

The employer did permit scrap lumber to be unloaded, where employees or their families so desired [Tr. 8, 25, 26, 27]. Otherwise the lumber would be discharged at sea [Tr. 26].

The widow of the employee filed a claim with the Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency [Tr. 7]. After due hearing, the Commissioner found that "the act of bringing said coal on board was within the general scope of his duties in that it was part of his work to direct the winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said *direction of the Mate* was an act of *minor disobedience* in the course of his work and not an act taking him outside the scope and course of his employment" [Tr. 8-9]. (Italics supplied.)

Award was made for the widow [Tr. 10]. The employer and its insurance carrier duly filed a complaint for injunction against enforcement of the award and for a decree that it was not in accordance with law [Tr. 2-6]. The widow answered, and both the plaintiffs and the defendant Pillsbury moved for summary judgment [Tr. 11, 12, 44, 45]. At the Court's request, all parties stipulated that the transcript of the testimony before Pillsbury could be deemed a part of the said motions [Tr. 46, 47]. Both sides filed points and authorities, which the Court considered. After a perfunctory hearing, the Court declin-

ing to hear argument, the plaintiffs' motion was denied and the defendant Pillsbury's was granted [Tr. 52-53]. Judgment was entered accordingly [Tr. 48]. The plaintiffs appealed [Tr. 50].

I.

This Court Has Power to Review the Question of Whether the Injury Sustained by Decedent John A. Anderson, Which Resulted in His Death, Arose "Out of and in the Course of Employment" Within the Meaning of 33 U. S. Code 902.

This appeal is based on the contention that the award [Tr. 10] is "not in accordance with law" (33 U. S. Code 921(b)).

It is contended that the award is not in accordance with law, in that the Federal law limits liability of an employer for death of an employee to a situation where the "death results from an injury occurring upon the navigable waters of the United States * * *" (33 U. S. Code 903).

The Act defines "injury" to mean "accidental injury or death arising out of and in the course of employment" (33 U. S. Code 902).

LEGAL PROBLEM.

The question of whether an employee was in the course of employment at the time of the injury is a legal problem, when the facts relative to the employee's duties are undisputed. The determination by the Commissioner will be reviewed by the Courts.

Norton v. Warner Co. (1944), 321 U. S. 565, 88 L. Ed. 931, 64 S. Ct. 747;

Tucker v. Branham (C. C. A. 3rd, 1945), 151 F. 2d 96.

II.

The Violation of an Employer's Lawful Order, by an Employee, for His Own Benefit or That of a Stranger, Amounts to a Frolic and Detour, which Removes the Employee From the Course of Employment.

The evidence was uncontradicted that the employee here disobeyed a specific *direction* of the employer not to use the No. 1 winch to load the coal and not to load the coal at all but to leave that job for the crew.

The Commissioner attempted to create an exception to the recognized legal rules by holding “* * * that his failure to comply with said direction of the mate was an act of *minor disobedience* * * *” [Tr. 8, lines 28-29]. (Italics supplied.) There is no doubt that this so-called *minor disobedience* was serious and dangerous enough to become the proximate cause of the death of the man who committed it. To describe it as minor seems the acme of understatement, under the circumstances. Diligent search has failed to reveal any case law to support an exception that the Commissioner can keep the employee in the course of employment by describing the violation as *minor*.

COMMON LAW.

The rule at common law, before the enactment of workmen's compensation legislation, prevented a servant from recovering from the master for damages sustained by injury proximately caused by the servant's violation of the master's order.

Schuh v. Herron (1917), 177 Cal. 13, 169 Pac. 682;

39 *Corpus Juris* 804, 806;

15 *A. L. R.* 1378.

The Workmen's Compensation Acts were not designed to change the common law rule in this regard.

Schuh v. Herron, *supra* (Calif. Employers' Liability Act).

So also, the Federal Employers' Liability Act did not abolish the rule that an employer is not liable for injury to an employee proximately caused by disobedience of an order which was not abrogated by non-enforcement.

Unadilla V. R. Co. v. Coldine (1928), 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224;

Yadkin R. Co. v. Sigman (1925), 267 U. S. 577, 45 S. Ct. 230, 69 L. Ed. 796;

McAllister v. Sunrock R. Co. (1945), 93 N. H. 400, 42 A. 2d 733;

Miller v. S. P. Co. (1933), 82 Utah 46, 21 P. 2d 856 (cert. den. 290 U. S. 697).

RESTATEMENT RULE.

The *Restatement of Agency* provides that:

"Except where a statute provides otherwise, a servant harmed by the concurrence of his own wilful and unjustified violation of orders and the negligence of the master has no cause of action against his master for such harm."

Restatement of Agency, Sec. 526.

STATE CASES.

The statutory phrase, "arising out of and in the course of employment," is the standard language of workmen's compensation legislation. Congress, in copying those words from the New York law, unfailingly indicated its intention to adopt a rule uniform with prevailing state

practice. State cases, especially those of New York, thus are established precedents.

Case v. Pillsbury (C. C. A. 9th, 1945), 145 F. 2d 392;

West Penn. Sand Co. v. Norton (C. C. A. 3rd, 1938), 95 F. 2d 498;

Empl. Liab. Assur. Corp. v. Monohan (C. C. A. 1st, 1937), 91 F. 2d 130;

Kobilkin v. Pillsbury (C. C. A. 9th, 1939), 103 F. 2d 667.

Under the New York rule the servant must be doing the work he was hired to perform.

DiSalvo v. Menihan Co. (1919), 225 N. Y. 123, 121 N. E. 766;

Glatzl v. Stumpp (1917), 220 N. Y. 71, 114 N. E. 1053;

Johnson v. Seeberg Mfg. Co. (1925), 211 App. Div. 241, 207 N. Y. Supp. 401 (unauthorized use of a saw by a varnish sprayer, held not in course of employment . . . even though no prohibitive order proved).

Aiding oneself or a fellow-servant is beyond the course of employment, even though the employer derives an incidental benefit.

Marks v. Grey (1928), 251 N. Y. 90, 167 N. E. 181;

Gisner v. Dulap (1920), 191 App. Div. 633, 181 N. Y. Supp. 789;

Lansing v. Hayes (1921), 188 N. Y. Supp. 329, 196 App. Div. 671 (affirmed 233 N. Y. 614, 135 N. E. 940).

The uniform and universal rule in the construction and application of the said standard phraseology ("arising out of and in the course of employment") negates liability where the injury would not have occurred *but for* the employee's deliberate and direct violation of orders of his master.

39 *Corpus Juris* 806;

20 *R. C. L.* 789, 790, 796, 797;

35 *Am. Jur.* 852, 853;

Metro. Sand Co. v. Lowe (D. C. N. Y., 1938), 22 Fed. Supp. 65;

Fazio v. Cardillo (App. D. C., 1940), 109 F. 2d 835 (horseplay);

Horsfall v. The Juna (Engl., 1913), W. C. & Ins. Rep. 183;

Yodakis v. Alex. Smith Co. (1921), 183 N. Y. Supp. 768, 193 App. Div. 150 (affirmed in 230 N. Y. 593, 130 N. E. 907).

The leading British case is *Herbert v. Fox* [1916] A. C. 405, 7 B. R. C. 142, Ann. Cas. 1916D 578 (which the Supreme Court has cited favorably in the case of *Cardillo v. Liberty Mutual Ins. Co.* (1947), 330 U. S. 469 at 479, 91 L. Ed. 1028, 67 S. Ct. 801). In the *Herbert* case it was held that a workman whose duty was to walk ahead of a moving car, as a lookout, is not in the course of employment, where he rides the car buffer, and thus proximately causes his own injury.

One of the leading and most frequently cited American precedents is *In re McNicol* (1913), 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306, in which Chief Justice

Rugg traces the origin of the phrase "arising out of and in the course of employment" to the English statute, and states that the earlier British decisions "are entitled to weight."

See *Murphy v. Cooney* (1914), 2 I. R. 76, 48 Irish Law Times 13 (held, drunken mate not injured in course of employment, where master relieved him of duty and ordered him below, but he remained eight or ten minutes at head of ladder leading to deck and then apparently fell down the ladder. The award by the court below was reversed).

California cases recognizing the rule include the following:

Cor. Beach Co. v. Pillsbury (1916), 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F 1164, 21 I. A. C. 384 (horseplay case, holding no liability because the risk must be one reasonably incident to the employment);

Ind. Indem. Exch. v. I. A. C. (June 15, 1948), 86 A. C. A. 226, 194 P. 2d 552 (where employee asked to use truck to get clothing to move from one job to another for same employer. On refusal, he took truck anyway and was killed in an accident. Held: not in course of employment);

Nat. Auto Ins. v. I. A. C. (1937), 8 Cal. 2d 715, 68 P. 2d 361 (held, a servant whose instructions were to report to work at 3 a. m. and wait at shop for the master, was not in the course of employment when he left the shop area to look for his master. He was beaten and robbed three blocks from the shop);

S. F. Ry. Co. v. I. A. C. (1927), 201 Cal. 597, 258 Pac. 86 (where a boat captain went onto the wharf to repair a jammed contact point, without taking the precaution of turning off the electric current. His orders were "to log the damage and immediately report it to the line repair staff for repair." As in the instant case, his action was a violation of the order, and the court held the consequent injury did not arise out of or in the course of employment);

Williamson v. I. A. C. (1918), 177 Cal. 715, 171 Pac. 797 (refusing to make an unwarranted construction of the law to cover the volunteer act of a chambermaid who good-naturedly tried to do the janitor's work, while the janitor was ill);

Lumberman's Mut. Co. v. I. A. C. (1933), 134 Cal. App. 131, 25 P. 2d 22 (*held* injury while loitering in street near work place, while awaiting arrival of packing boxes so he could start picking oranges, is not a normal employment risk and not compensable);

Jenks v. Carey (1933), 136 Cal. App. 80, 28 P. 2d 91 (upholding finding that employee voluntarily doing an act beyond his duties even for employer, is outside the course of employment);

N. W. Pac. R. R. Co. v. I. A. C. (1917), 174 Cal. 297, 163 Pac. 100, L. R. A. 1918A 286 (*held*, railroad clerk, on duty on train who alighted to see result of a train accident and was himself killed while trying to reboard the train, was not in the course of employment);

Pac. Coast Cas. Co. v. Pillsbury (1916), 31 Cal. App. 701, 162 Pac. 1040 (*held* injury while using elevator in violation of order, is not compensable, as not in course of employment).

U. S. ATTORNEY'S ARGUMENT BELOW.

In the District Court, the U. S. Attorney argued that certain cases tended to support his view that the Award should be ruled legal. In anticipation that he still relies on the cases he cited below, we present the following analysis of his cases:

1st. Capital Transit Co. v. Hoage (App. D. C., 1936), 84 F. 2d 235, a case in which one Parrott, an employee, had been ordered not to work on any electrical equipment carrying live electricity, because of the employee's bad accident record. The employee worked on repair of cylinders, and the testing of such cylinders with high voltage current was a necessary part of the process, and would have had to be done by some fellow-employee. The employee, however, in violation of orders, made the test himself, without using any of the standard precautions such as insulated gloves, which were available. The only other fellow-employee available at the time of the test told the employee Parrott to "put 1500 on it." The Commissioner found as a fact that in making the test, Parrott did not deviate "from his duties." The appellate court held that even though he disobeyed his instructions, he was still doing a necessary part of the job on which he was working.

In the instant case, the loading of the coal with the wrong equipment at the wrong time by persons who were paid at an hourly rate for other work was totally unnecessary, as far as the employer was concerned, and merely increased the expenses of the employer by making it necessary to have the coal reloaded and moved with other equipment at later time. If the employee had obeyed orders, the additional time of reloading the coal on other

equipment would have been saved. Moreover, in the instant case, the instruction was clear and unequivocal, whereas in the *Capital Transit* case, a fellow employee had actually instructed Parrott to perform the test and Parrott was thus directly aiding an employee who was authorized (and not forbidden) to make the dangerous electrical test.

2nd. The case of *Md. Cas. Co. v. Cardillo* (App. D. C., 1939), 107 F. 2d 959, involved the murder of an insurance agent, by strangers who had apparently picked him up while he was drunk for the purpose of robbery, because they saw he was carrying an insurance book and thought he might have made sizeable collections. The deputy commissioner found "that the criminal risk or hazard * * * was peculiar to, and increased by, his employment as an insurance collector." Surely, the Government does not seriously contend that such a case is in point! Can it be said that the risk of death from violation of orders was increased by the "tempting" nature of Anderson's employment in charge of machinery which is dangerous when not used properly? Such a holding would stretch beyond the breaking point the legal test—"arising out of and in the course of employment."

3rd. The case of *Bull Insular Line v. Schwartz* (D. C. N. Y., 1938), 23 Fed. Supp. 359, involved a situation where a longshoreman was killed when he went aboard ship to obtain a dunnage board to stand on while he worked on the dock during the rain. There was evidence that it was customary for longshoremen to go aboard the ship for such purpose and also in order to smoke. *The Deputy Commissioner failed to make any finding regarding the employer's alleged rule forbidding longshoremen*

to board ship, and the court found only unsubstantial evidence thereof in the record. The case is supported on the rule that a scintilla of evidence is not enough, or on the rule that a conflict in the evidence had been resolved by the Commissioner, or on the rule that violation of a standing order which is never enforced does not take the servant beyond the course of his employment (*Cf. Tullis v. Lake Erie Ry.* (C. C. A. 7th, 1901), 105 Fed. 554, for the same rule under common law).

4th. The case of *Penn. Stevedoring Corp. v. Cardillo* (D. C. N. Y., 1947), 72 Fed. Supp. 991, also involved alleged violation by the employee of a standing order regarding not leaving the barge on which he worked, during the ten minute rest period between trips. The Court said:

“There was ample evidence from which he (the deputy commissioner) could infer that if there were a company rule limiting the scope of Best’s wanderings, it was not strictly enforced. * * * Violation by the employee of an unenforced rule cannot defeat an otherwise well founded claim to compensation.” (at p. 993.)

It is respectfully submitted that this case is not in point inasmuch as the instant case concerns a direct, specific order given immediately before the accident, and does not involve any evidence of any standing order which was customarily disregarded and left unenforced.

It is further submitted that an employer must be allowed to control his employees, especially by specific directives; and employees who deliberately and immediately violate said orders must necessarily be regarded in a realistic way, that is, as having departed from the course of

their employment and having entered into a frolic and detour of their own.

The Government further raised the "calamity howl" that a holding in plaintiffs' favor "would permit an employer by means of a comprehensive set of rules, to render the statute practically nugatory," quoting *Nachechko v. Bowen Mfg. Co.* (N. Y. 1917), 179 App. Div. 573. It will be time enough to cite that reasoning when a case arises where the employer has tried to negate his statutory liability in that manner by a comprehensive set of rules. *This case is certainly not an apt one for its citation.* Here the employer merely asked the employee to do the work he was hired to do and ordered him not to enter into a frolic and detour of his own for the purely private purpose of helping a friend to obtain some waste and scrap wood on the deck. The Commissioner surmised that the employee was going to use the sling in which the coal was loaded for moving the lumber. The Commissioner jumped from the fact that if the sling had been free, the employer would have customarily permitted its use for discharging the lumber, to the conclusion that it was therefore *within the course of employment for an employee to violate a specific instruction, just given and fresh in his mind, not to pick up and unload the sling which carried the coal.* There was no evidence of a custom of loading coal to free a sling to unload lumber.

It is submitted that that kind of "logic" would make the employer the insurer of the safety of an employee

who, in deliberate violation of a specific order, uses a dangerous instrument for his own private purpose and in doing so accidentally kills himself! *Is that the purpose of the law? Should it be liberally construed to effect that result?*

WILFUL MISCONDUCT.

The Government argued that the rule-violation must amount to wilful misconduct to constitute a bar. No Federal cases were cited by the Government on this point. But, can anyone doubt that the employee here *wilfully* disobeyed the specific order? And, can anyone doubt that it is *misconduct* for an employee to disobey such an order?

The "second rule" cited by the Government which they say plaintiffs and appellants have not complied with, is that an employee who is *doing his job* is within the course of employment even if he violates orders as to how to do it. It is submitted that the argument begs the question, which is

Can an employee be held to be doing his job and acting within the course of his employment when he deliberately violates an order not to pick up a load of coal with the employer's machinery, by picking up that load, as a result of which it swings against him and kills him, when his purpose in picking it up was a private detour of his own, to obtain a sling to discharge scrap lumber for a friend?

The problem cannot be solved by begging the question. It calls for an exercise of judicial discretion in the appli-

cation of the Federal statute and the determination of whether Congress intended to cover the type of activity here involved when it enacted as the legal test the traditional phrase in compensation laws, "arising out of and in the course of employment."

It is respectfully submitted that had Congress intended to broaden the usual test of liability, it would have used different and more inclusive language which had not already been judicially construed more narrowly.

THE VOEHL CASE.

The case of *Voehl v. Indem. Ins. Co.* (1933), 288 U. S. 162, 77 L. Ed. 676, was cited by the Government as "in direct support of the present award." The case arose under the District of Columbia Law, where an employee was driving to work on Sunday and where his pay was computed from the time he left home. The employer's defense was that on the occasion in question, the injured employee had a private purpose, *i. e.*, to obtain ashes for personal use. The evidence indicated a mixture of private purpose and also of cleaning up trash as a part of his regular job. *The injury did not occur while the employee was engaged in an exclusively private venture in violation of recently given specific orders of the employer.*

How such a case is "in direct support of the present award" is not explained in the Government's Points and Authorities!

The Government relied heavily on the case of *Cardillo v. Liberty Mut. Ins. Co.* (1947), 330 U. S. 469, 67

S. Ct. 801, 91 L. Ed. 1028. That case involved the familiar rule that an employee is not covered by workmen's compensation while en route to work, and the standard exception to that rule, providing coverage where the hazards of the route to the place of work "may fairly be regarded as the hazards of the service." The employee worked for a District of Columbia corporation, under a collective bargaining agreement which required the employer to pay transportation for all work assigned to the employee outside the District. He was assigned to the Quantico Marine Base and traveled there with fellow employees, under a car-pool arrangement. The accident occurred while the employee was en route. The Supreme Court reversed a Circuit Court decree against the Commissioner's finding of "course of employment," upon the ground that the finding was supported by substantial evidence. *The rule of the case was certainly not intended by the Court to solve all future problems.* The Court said:

"No exact formula can be laid down which will automatically solve every case."

Mr. Justice Murphy decided the case by judicial examination of the record:

"Turning to the factual support for the Deputy Commissioner's inference that Ticer's injury arose out of and in the course of employment, we find ample sustaining evidence." (330 U. S. at 483, 91 L. Ed. 1039.)

III.

**Is an Act Permitted by the Employer Therefore With-
in the Course of Employment?**

It will be noted that the Commissioner's report says that the purpose of Anderson, according to surmise (or conjecture?) was to obtain the sling to use it "to discharge some waste and scrap wood on the deck to the dock, *an act permitted by the employer.*" [Tr. p. 8, lines 19 to 24.]

Of course, conjecture and surmises are not substantial evidence of the kind required to support a finding.

New Am. Ins. Co. v. Hoage (1939), 46 F. 2d 837;

Eldridge v. Endicott (1920), 228 N. Y. 21, 126 N. E. 254;

Note, 20 A. L. R. 1.

But where, to begin with, is there any authority that the employer's tolerance or permission is sufficient to make the servant's action a part of the course of employment?

Under the New York rule, prevailing when Congress copied the New York statute, the servant's permitted use of the master's facilities for a private purpose, even as a part of the compensation, did not make the "work" thus done a part of the course of employment.

Daly v. Bates (1918), 224 N. Y. 126, 120 N. E. 118.

On the contrary, the action here was for the personal convenience of the servant or his friends. It was worse than useless, as far as the employer was concerned, to load coal with the wrong winch, in the wrong place, at superadded expense!

Moreover, there was not a scintilla of evidence that the employer ever permitted coal to be loaded by longshoremen to free a sling for use in discharging scrap lumber for private use.

The *Agency Restatement*, at page 511, contains the following apt comment:

“If, however, such acts are for the personal convenience of the employees and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment. As in other situations, the fact that the acts are done upon the master’s premises or with his instrumentalities is important but not conclusive.”

It seems clear, therefore, that the Commissioner’s finding that the practice of discharging scrap lumber was *permitted* by the employer—although true in itself—is insufficient to warrant a conclusion that this employee was in the course of employment or that the injury arose out of the employment.

It was undisputed that the injury arose out of the employee’s attempt to load coal in violation of a direct order, and that such loading would free the sling.

If the employee had loaded the coal safely, freed the sling, and has started to unload the lumber—then perhaps it could be rationally argued that he was doing a *permitted* action—in spite of the earlier orders. But surely there is no ground in the record to support a conclusion that he was *permitted* to disobey the chief mate’s order not to load the coal!

The Act is entitled to liberal construction *to accomplish its purpose*, but it should not be misconstrued to make

employers insure employees against injury arising from violation of orders for private, non-business purposes. The increased insurance premium for such risks is not a proper item of business and industrial expense.

Cf. Contractors v. Pillsbury (C. C. A. 9th, 1945),
150 F. 2d 310.

Conclusion.

It is therefore submitted that the District Court erred in giving summary judgment for defendants, and that the judgment should be reversed with instructions to give judgment for plaintiffs as prayed, on the ground that the Commissioner's award was not in accordance with law.

Respectfully submitted,

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Attorneys for Appellants.

No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,
Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, and ANNA ANDERSON,
Appellees.

BRIEF OF APPELLEE, WARREN H. PILLSBURY.

FILED

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No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

BRIEF OF APPELLEE, WARREN H. PILLSBURY.

I.

JURISDICTIONAL STATEMENT.

The United States District Court had jurisdiction in this case in that the complaint was filed under the provisions of 33 U. S. C. 921(b), 44 Stat. 1434, 49 Stat. 1921 [T. 2]. This court has jurisdiction under the provisions of Title 28, Section 1291, of the United States Code.

II.

STATEMENT OF THE CASE.

This is an appeal from a decision of the United States District Court for the Southern District of California, Central Division, Honorable Ben Harrison, District Judge, affirming a Compensation Order of the Deputy Commissioner, appellee, filed on February 27, 1948. The said Compensation Order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1434, 33 U. S. C. A., Sections 901 *et seq.*, and awarded a death benefit to Anna Anderson, widow of John A. Anderson who sustained fatal injuries on November 29, 1947, while employed as a longshoreman by the Burns Steamship Company on the "S. S. Daisy Gray" in Los Angeles Harbor, California. The compensation liability of the employer was insured by the appellant, Associated Indemnity Corporation [T. 3].

The claim for compensation was controverted by the employer and the insurance carrier upon the ground that the injuries did not arise out of and in the course of employment. A hearing was held before the Deputy Commissioner on December 16, 1947. The testimony at said hearing is printed in the Transcript of Record and will be referred to hereafter. After the Compensation Order was filed, the employer and carrier instituted a proceeding for judicial review of the Compensation Order pursuant to Section 21(b) of the Longshoremen's Act (33 U. S. C. A., Section 921(b)), alleging in substance that the Compensation Order is not in accordance with law in that the evidence does not support the finding that the injury arose out of and in the course of employment [T. 2]. Thereafter, both the plaintiffs and the defendant, Pillsbury, moved for summary judgment [T. 12, 45]. All

parties stipulated that the transcript of testimony before Pillsbury should be deemed a part of said motions [T. 46]. Subsequently, the court denied the plaintiffs' motion and granted the defendant Pillsbury's motion for summary judgment. Judgment was entered [T. 48] and the plaintiffs filed a notice of appeal on November 5, 1948 [T. 50].

III.

STATUTE INVOLVED.

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1434, 33 U. S. C. A., Section 901 *et seq.*

Section 902(2) provides as follows:

"The term 'injury' means accidental injury or death arising out of and in the course of employment,
* * *."

Section 903(b) provides as follows:

"No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

Section 904(b) provides as follows:

"Compensation shall be payable irrespective of fault as a cause for the injury."

Section 905, provides, in part, as follows:

"* * * In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Section 920 provides as follows:

“Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

“(a) That the claim comes within the provisions of this chapter.

“(b) That sufficient notice of such claim has been given.

“(c) That the injury was not occasioned solely by the intoxication of the injured employee.

“(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, §20, 44 Stat. 1436.)”

Section 921(b) provides as follows:

“If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the district of Columbia if the injury occurred in the District). * * *”

IV.
FACTS.

The Deputy Commissioner in the Compensation Order complained of found the facts with reference to the employee's fatal injury to be in part as follows:

"That on the 29th day of November, 1947, John A. Anderson, husband of the claimant herein, was in the employ of the employer above named at Los Angeles Harbor in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Associated Indemnity Corp.; that on said day the said John A. Anderson while performing service for the employer as a longshoreman and engaged in stevedoring operations on the 'SS Daisy Gray' afloat on Navigable waters of the United States at said harbor sustained personal injury occurring in the course of and arising out of his employment and resulting in his death the same day as follows: (7) The said employee, while acting as hatch-tender, was signalling the bringing on board by the ship's winches of a sling load of coal for use in ship. The sling load swung against him, causing injuries from which he died the same day. He had been previously requested by the ship's mate, a superior officer, to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch. The reasons for his disregarding said request are not known, although it may be surmised that he did so in order to obtain the sling in which said coal had been placed for the purpose of using it to discharge some waste and scrap wood on the deck to the dock, an act permitted by the employer; that the act of bringing said coal on board was within

the general scope of his duties in that it was part of his work to direct the winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said direction of the mate was an act of minor disobedience in the course of his work and not an act taking himself outside the scope and course of his employment."

V.

QUESTION INVOLVED.

Is the finding of the Deputy Commissioner that the injury arose out of and in the course of employment supported by the evidence?

VI.

THE ARGUMENT.

The Finding of the Deputy Commissioner That the Injury Arose Out of and in the Course of Employment Is Supported by Evidence.

The following is a reference to so much of the testimony taken before the Deputy Commissioner on December 16, 1947, as is considered sufficient to show that the above-mentioned finding of fact of the Deputy Commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the Deputy Commissioner.

At the commencement of the hearing before the Deputy Commissioner on December 16, 1947, it was stipulated in part that:

1. John A. Anderson, husband of the claimant herein, was in the employ of defendant, Burns Steamship Company, at San Pedro, California, on and about November

29, 1947, as the winch driver and hatch tender, and at said time said employer was insured against liability under the Longshoremen's and Harbor Workers' Compensation Act by insurance with the defendant, Associated Indemnity Company.

2. That he met with fatal injury on said date on said vessel.

3. That the claim is within the provisions of said Act [T. 16].

Ernest L. Bliss testified that he was chief mate on the "S. S. Daisy Gray" and knew John Anderson; that he saw him sustain his injury when he was struck by a sling load of coal which was being swung from the gangway to No. 2 hatch along the area-way on the port side of the vessel [T. 20]; that the coal was being loaded from the dock to the vessel; that at the time Anderson was working as one of two longshoremen known as winch drivers and that he was then acting as the hatch tender and had given the signal to raise the sling of coal to place it aboard ship; that about seven or eight minutes before the accident and at about the same spot where Anderson was struck the witness had a conversation with Anderson [T. 21]; that Anderson asked him if he could use the sling which was on the dock loaded with coal to bring the coal aboard but that he told Anderson it could not be done with No. 1 gear because it had to be taken to the starboard side and the vessel was portside to the dock; that Anderson then asked him why he could not take the load aboard with No. 1 gear and he told Anderson because it had to go on the starboard side and that the sailors would take it aboard with No. 2 gear when they got through with the No. 3 gear; that during this conversation Anderson told him that he wanted the sling to get certain lumber off the deck of the vessel

so that it could be made available as firewood [T. 22, 23]; that as far as the lumber is concerned there was the question whether it would be removed by the crew or the longshoremen, but it would be taken off the vessel in any event or it might be thrown over at sea [T. 24, 25]; that there is no common practice about the removal of the trash lumber; that there are two men who work at a hatch, the operator of the winch and the hatch tender and that Henry Tornquist was the operator of the winch; that he (the witness) does not, however, give orders for every sling load; that there always have been two winch drivers working together; *that the lumber that goes off is strictly up to them* [T. 26]; *that the coal in question belonged to the ship and was to be brought aboard ship sooner or later; that it was in a sling on the dock waiting to be lifted aboard but he preferred to have it brought in by a different winch and on a different side* [T. 28, 29]; *that the sling on which the coal was brought aboard belonged to the vessel; that the hatch tender (Anderson) was in immediate charge of moving of the loads* [T. 31, 32].

Henry Tornquist testified that he was a longshoreman and winch driver-hatch tender and that on November 29 last he was driving the winch on the "S. S. Daisy Gray" at the time of this accident [T. 32]; that Anderson told him to pick up the load of coal; that he picked up the sling load of coal and when the load swung back it dropped down; that he did not see Anderson [T. 33] when he was hit [T. 34]; that he had just deposited a load of lumber on the dock and then picked up the load of coal in the same sling instead of coming back empty [T. 34]; that just before Anderson directed him to lift this coal he saw Anderson talking with Mate Bliss but could not hear the conversation, but that right afterwards Anderson

told him to bring the coal aboard [T. 34]; *that he has loaded the cook's coal before, many times, and on this ship off and on* [T. 35]; *that sometimes the ship's crew takes this coal aboard and sometimes the longshoremen do when the crew is busy and the longshoremen get through their work before them*; and that generally ship's stores are taken aboard by the longshoremen gang if the sailors are behind in their work, and *that at the time in question the sailors were working at hatch No. 3 while the longshoremen who had been working at No. 2 hatch were through* [T. 36]; that the coal could be carried from the dock to the deck either by No. 1 or No. 2 gear, but No. 2 gear was not rigged up [T. 33]; that the coal could be moved from the portside deck to starboard by No. 2 gear, which they actually did later; that when he picked up the coal he didn't know whether he was to leave it on deck or dump it out of the sling as he did not know what Anderson intended doing with the sling [T. 34]; that at the time they were finishing the job having the vessel almost loaded at the time of the accident [T. 35].

Ernest L. Bliss, chief mate, after hearing the testimony of the previous witness, Henry Tornquist, further testified as follows:

"I would like to say one more thing. *The longshoremen, as he stated, do sometimes occasionally hook onto something and bring it on board ship, but when they bring it on board they land it, but the sailors always take it and store it. The sailors will finish storing it; they only bring it on board the ship.*" [T. 41].

It is respectfully submitted that the evidence above referred to supports the Deputy Commissioner's finding to the effect that the death arose out of and in the course of the employment and under the authorities should be

considered as final and conclusive. In the case of *Cardillo, Deputy Commissioner, v. Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947), the court stated at page 477:

“In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner’s inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. * * *

See also:

South Chicago Coal & Dock Co., et al. v. Bassett, Deputy Commissioner, 309 U. S. 251 (1940);

Del Vecchio v. Bowers, 296 U. S. 280 (1935);

Voehl v. Indemnity Insurance Co. of North America, 288 U. S. 162 (1933);

Crowell, Deputy Commissioner, v. Benson, 285 U. S. 22 (1932);

Jules C. L’Hote, et al. v. Crowell, Deputy Commissioner, 286 U. S. 528 (1932), 71 C. J. 1297, Sec. 1268;

Parker, Deputy Commissioner, v. Motor Boat Sales, Inc., 314 U. S. 244 (1941);

Marshall, Deputy Commissioner, v. Pletz, 317 U. S. 383 (1943).

In this connection, it should be noted that the coal in the sling which the deceased ordered taken aboard the vessel was to have been placed on the vessel as part of the ship's stores sooner or later [T. 28], and further it should be noted that this was often done by the long-shoremen [T. 36], which fact was admitted by Mr. Bliss, the mate of the vessel [T. 41]. It would appear therefore that the loading of the coal was a routine operation and within the scope of the deceased's employment. Whether the performance of such an operation in a manner different from that prescribed, changes the status of the employee will be discussed below. Whether any unequivocal orders had been disobeyed may be questioned by a proper inference from the evidence. The witness Tornquist, who was driving the winch at the direction of the deceased, testified that almost immediately after talking with the mate of the vessel the deceased ordered the witness to pick up the coal. It may be reasonable to infer that the deceased had spoken to the mate concerning the coal and had not received unequivocal instructions or orders to move it, the testimony of Mr. Bliss to the contrary notwithstanding. It is solely within the province of the Deputy Commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability:

Wilson & Co. v. Locke, Deputy Commissioner, 50 F. 2d 81 (C. C. A. 2nd, 1931);

Naida v. Russell Mining Co., 159 Pa. Super. 155, 48 A. 2d 16 (1946);

Griffin's Case, 315 Mass. 71, 51 N. E. 2d 768 (1944);

Pittsburgh Plate Glass Co. v. Morgeson, 177 P. 2d 115 (Okla. 1947);

Lockheed Aircraft v. Industrial Accident Commission, 28 Cal. 2d 756, 172 P. 2d 1 (1946);

Square D Co. v. O'Neal, 66 N. E. 2d 898 (Ind. App. 1946).

VIOLATION OF ORDERS.

Assuming that deceased was told not to use the No. 1 gear to bring the coal on board because it was necessary to use No. 2 gear for the starboard side where the coal was to be stored, his injury nevertheless arose out of and in the course of his employment. The injury or death of an employee under the Longshoremen's Act may be compensable as arising out of and in the course of his employment, notwithstanding the alleged violation of instructions by an employee.

Capital Transit Co. v. Hoage, Deputy Commissioner, 65 App. D. C. 382, 84 F. 2d 235;

Bull Insular Line, Inc., et al., v. Schwartz, Deputy Commissioner, et al., 23 Fed. Supp. 359 (N. Y. 1938).

In the *Capital Transit Company* case, *supra*, where the employee was killed while making a test by means of an electrical current, in violation of specific instructions to stay away from electrical current, the court said:

"Therefore, although Parrott while engaged in the work did not obey the instructions given to him by his employer, he continued nevertheless to work in the employment of the employer and his accidental death arose out of it."

This is a leading case and is on all fours with the instant case in that it involves a violation of an instruction relating to an act connected with the employee's work.

Many cases are cited in the opinion just quoted (which involve construction of the Longshoremen's Act as applied to employment in the District of Columbia) to the effect that violation of a rule does not *necessarily* bar the right to compensation. Although the administrators of the compensation law and the courts in the beginning were inclined to reject compensation claims for injury sustained while the employee was violating instructions, it soon became apparent that the purpose of the compensation law, namely, that the particular industry where the injury was sustained should take care of the injured employee and his dependents, was not being fulfilled by denying compensation in all cases where the injury occurred while the employee was violating instructions.

In the course of time certain principles were adopted with reference to cases where a defense was interposed that the employee was injured while violating a rule or instruction. We shall enumerate only those which are applicable to the instant case. The courts stated

(1) That the violation of a rule or instruction, to constitute a bar to compensation, must amount to *willful misconduct*.

Nickersons' Case, 218 Mass. 158 (1919);

Sloss-Sheffield Steel Co. v. Green, 113 So. 271, 216 Ala. 267 (1927);

Belyus v. Wilkinson, 178 Atl. 181, 115 N. J. L. 43 (1935);

Black Mountain Corp. v. Higgins, 10 S. W. 2d 463, 226 Ky. 7 (1928).

The *Belyus* case, *supra*, is typical. In that case the court said that the word "willful" means improper, deliberate conduct, premeditated obstinacy, and intentional wrong-

doing, with knowledge that it is likely to result in serious injury, or wanton and reckless disregard of its probable consequences. The construction and interpretation of the compensation law in the cases just cited are in accord with the construction placed upon the Longshoremen's Act by the United States Court of Appeals for the District of Columbia in *Hartford Accident and Indemnity Co. v. Cardillo, Deputy Commissioner*, 112 F. 2d 11 (1940), cert. den. 310 U. S. 649. The latter Court stated that the kind and degree of acts resulting in injury for which recovery is barred is indicated, first, by the broad presumption which is set forth in the statute in favor of compensability (section 20—33 U. S. C. A., section 920), and, second and more explicitly, by the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by claimant, namely, that

“No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee *or by the willful intention of the employee to injure or kill himself or another.*” (Italics supplied by court.)

The court concluded as follows:

“The provision, reinforced by the statutory presumptions and the Act's fundamental policy in departing from fault as the basis of liability and of defense, except as specified, is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, illegality, etc., *unless it amounts to the kind and degree of misconduct prescribed in definite terms of the Act.*” (Italics supplied.)

(2) A second rule or principle enunciated by the courts in connection with the “violation of instruction” defense is that if the employee, at the time of injury, is doing something which is part of his job or incidental to it, but the violation of the rule consists in the *manner in which it is being done*, the violation will not bar the right to compensation.

Smith v. Industrial Accident Commission, 18 Cal. 2d 843, 118 P. 2d 6 (1941);

Ricci v. Katz, 44 N. Y. S. 2d 781 (1944);

Estler Bros. v. Phillips, 15 B. W. C. C. 291 (Eng. 1922);

Chila v. N. Y. Central R. R. Co., 297 N. Y. Supp. 850 (1937);

Wallace v. Rex Fuel Co., 216 Iowa 1239, 250 N. W. 589;

Omaha Boarding & Supply Co. v. Industrial Comm., 306 Ill. 384, 138 N. E. 106.

Applying these two principles to the instant case, it is apparent that the deceased in using the No. 1 gear instead of No. 2 gear to bring the coal aboard, if he was violating an instruction (assuming the mate so instructed) as to the manner of doing the work, was nevertheless doing something incidental to the deceased's job of loading and unloading the vessel. Moreover, his action if he disregarded the instruction was not such misconduct of such willful nature of the kind and degree specified in the statute as to bar recovery, which would amount to “willful intention of the employee to injure or kill himself or another” (33 U. S. C. 903(b)). The quoted language

supplies the only basis for defense in proper cases. Indeed the accident might well have happened with the use of one gear as the other. The end result in this case was not such as could have been foreseen.

Plaintiff alleged (paragraph VII of complaint) that because the deputy commissioner "surmised" at the reason why the deceased wanted to obtain an empty sling, the finding and award is "based upon mere surmise." Since the operation of loading the coal upon the vessel was not an act foreign to deceased's general duties, the secondary purpose which deceased may have had in mind in so doing (for example, the removal of the lumber trash) would be immaterial, although the removal of the lumber trash from the vessel would also have been incidental to the employment, albeit the deceased was doing two things (1) getting rid of trash, and (2) incidentally making such trash available for someone else's use. An almost identical type of activity is to be found in *Voehl v. Indemnity Insurance Co. of N. A.*, 288 U. S. 162, a case in which the employee went to his employer's establishment on a Sunday to clean up the place and remove trash which he intended to haul to his home for his personal use. An injury enroute to accomplish such purposes was held within the Act. So in the instant case that the transfer of the coal to the vessel was related to the release of a sling which might be used to unload lumber, presumably for the wife of a crew member, does not change the fact that both the loading of the coal and the unloading of the lumber might fairly be considered within the deceased's sphere of duties. The deputy commissioner could have used the word "inferred" instead of "surmise," as what the order contains is a finding based upon a reasonable inference from the evidence. Logical deductions and in-

ferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable.

Parker, Deputy Commissioner v. Motor Boat Sales, Inc., 314 U. S. 244 (1941);

Liberty Mutual Ins. Co. v. Gray, Deputy Commissioner, 137 F. 2d 926 (C. C. A. 9th, 1943);

Michigan Transit Corp. v. Brown, Deputy Commissioner, 56 F. 2d 200 (Mich. 1929);

Del Vecchio v. Bowers, 296 U. S. 280 (1935) (*supra*);

Eastern Steamship Lines, Inc. v. Monahan, Deputy Commissioner, et al., 21 Fed. Supp. 535 (Me. 1937);

Grain Handling Co., Inc. v. McManigal, Deputy Commissioner, 23 Fed. Supp. 748 (N. Y. 1938);

Simmons v. Marshall, Deputy Commissioner, 94 F. 2d 850 (C. C. A. 9th, 1938);

Lowe, Deputy Commissioner v. Central R. Co. of New Jersey, 113 F. 2d 413 (C. C. A. 3rd, 1940);

Contractors, PNAB v. Pillsbury, Deputy Commissioner, 150 F. 2d 310 (C. C. A. 9th, 1945).

It is alleged in paragraph VII of the complaint that the injury and death of John A. Anderson was not an accidental injury and death arising out of and in the course of the employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, but was the result of his own misconduct in that he violated instructions of the ship's mate.

Section 4 of the Longshoremen's Act, subdivision (b) thereof, 33 U. S. C. A., section 904(b), reads as follows:

"Compensation shall be payable irrespective of fault as a cause for the injury."

From the foregoing, it will be seen that it is immaterial whether or not the injuries of the employee were occasioned by reason of his fault, negligence or disobedience *so long as they were not occasioned solely by his intoxication or his willful intention to injure himself or another.*

Hartford Acc. and Indemnity Co. v. Cardillo, 112 F. 2d 11.

Neither negligence of the employee (if negligence is an ingredient of violation of instructions) nor increased risk resulting from the employee's conduct are defenses under compensation law. As the court stated in *Employers' Liability Assurance Corp. v. Hoage*, 69 F. 2d 227 (1934):

"Stress was laid in the argument on the rate of speed in which the automobile was being driven at the time of the accident. Granted this was shown by the evidence, it was no more than a showing of negligence, and granted further that this increased the normal risks of the employment, it would not defeat an award because by the terms of the act compensation is payable irrespective of fault as a cause of the injury (section 4(b), 33 U. S. C. A., sec. 904(b))."

The courts also reject the idea that the question of compensability is dependent upon the discretion of judgment exercised by the employee. In *Scott v. Hoage, Deputy Commissioner*, 63 App. D. C. 391, 73 F. 2d 114 (1934), it was stated:

"The question of compensation, however, does not depend upon the discretion exercised by deceased for his personal safety under these circumstances. Contributory negligence is not a defense to a claim for compensation."

See also:

Security Mutual Casualty Co. v. Wakefield, 108 F. 2d 273 (C. C. A. 5th, 1940);

Moore v. Cincinnati, N. O. & P. Ry. Co., 148 Tenn. 561, 256 S. W. 876 (1923).

APPELLANTS' BRIEF.

Appellants state (page 4 of their brief) that "when the facts relative to the employee's duties are undisputed" it becomes "a legal problem" as to "whether an employee was in the course of employment at the time of injury." In this connection the Supreme Court recently stated in *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Co.*, 330 U. S. 469, 478 (1947):

"It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers*, *supra*, 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board v. Hearst Publications*, 322 U. S. 111, 131; *Commissioner v. Scottish American Co.*, 323 U. S. 119, 124; *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143, 153-154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident

that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only 'if not in accordance with law.'

"Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion, our task is at an end."

This pronouncement was consistent with previous statements in similar cases.

Puget Sound Freight Lines v. Marshall, Deputy Commissioner, 125 F. 2d 876 (C. C. A. 9th, 1942);

Gray v. Powell, 314 U. S. 402, 412 (1941).

Appellants also contend (page 5 of their brief) (a) that the rule at common law prevented a servant from recovering from the master for injury proximately caused by the servant's violation of the master's orders, (b) that the Workmen's Compensation Acts were not designed to change the common law rule in this regard (citing one case in 1917), and (c) that the same rule applied in cases under the Federal Employers' Liability Act. While appellants have not stated the conclusion they wish the court to draw from the premise they state, it is apparent from their "Restatement Rule" on page 6 of their brief to the effect that the servant has no "cause of action" for the master's negligence concurred in by the servant's violation of orders, that they are urging that the *common law rule* should apply in the instant case to bar the right of the

widow of the deceased employee to compensation because of an alleged violation of an order. Common law tests and rules of liability have no place in remedial legislation in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 (1943). In *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company*, 330 U. S. 469 (1947) (*supra*), at page 481 the court stated:

“Indeed, to import all the common law concepts of control and to erect them as the sole or prime guide for the Deputy Commissioner in cases of this nature would be to encumber his duties with all the technicalities and unrealities which have marked the use of those concepts in other fields.”

This apart from the fact that the Longshoremen's Act itself provides that “compensation shall be payable *irrespective of fault* as a cause for the injury” (Sec. 4(b), 33 U. S. C. A., Sec. 904(b)).

Appellants have cited many cases on page 7 *et seq.* of their brief. We do not believe that it is incumbent upon us or necessary to comment upon each case individually. Most of the citations are old and arose when compensation laws were new and at a time when the administrators of compensation law and the courts had difficulty in construing the law other than by following common law standards, and also at a time when it was believed that dire results would follow other than a strict construction of a law which awarded an employee compensation, without fault on the part of the master. Other cases cited by appellants relate to “horseplay” and other factual situations not pres-

ent in the instant case. The so-called leading British case (*Herbert v. Fox* (1916)), cited on page 8 of appellant's brief, which appellants state was cited with approval in *Cardillo v. Liberty Mutual Insurance Company*, 330 U. S. 469 (1947) (*supra*), at page 479, footnote 4, was not cited there with approval as to its holding that a workman riding on the front of a car, instead of walking ahead of it, cannot recover compensation, but to emphasize the statement of the court in that case that the words "arising out of and in the course of employment" have been the source of a mass of decisions "turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion."

With reference to the case of *Contractors v. Pillsbury*, 150 F. 2d 310 (C. C. A., 1945) (*supra*), cited on the last page of appellants' brief, we are unable to discern the purpose of said citation since it does not, so far as we can perceive, pertain to the matter which precedes it. It does not refer to increased insurance premiums, the subject matter immediately before the citation (incidentally, there is nothing in the record to support the intimation that the allowance of the instant case, or similar cases, would increase insurance premiums), nor is there any reference in said opinion to the misconstruction of the Act which would "make employers insure employees against injury arising from violation of orders for private, non-business purposes," the next preceding matter. Perhaps it is cited in support of the next preceding statement that "the Act is entitled to liberal construction to accomplish its purpose."

Conclusion.

It is respectfully submitted that the evidence and the permissible inferences to be drawn therefrom support the finding that the deceased's death arose out of and in the course of employment. Moreover, Section 20 of the Act (33 U. S. C. A., Sec. 920) raises the presumption that the deceased's injuries arose out of and in the course of the employment; in addition to this statutory presumption there is the presumption which the courts have recognized independently of said statutory presumption that the injury arose out of and in the course of the employment where it occurs on or about the industrial premises.

The determination of the deputy commissioner complained of has "warrant in the record" and a "reasonable basis in law" and should be accepted upon judicial review. *N. L. R. B. v. Hearst Publications Inc.*, 322 U. S. 111, 131 (1944), (*supra*).

The judgment of the court below was proper and should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Asst. U. S. Attorney,
Chief of Civil Division;

LEILA F. BULGRIN,
Asst. U. S. Attorney,

Attorneys for Appellee, Warren H. Pillsbury.

No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employes Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

PETITION FOR REHEARING.

TIPTON & WEINGAND,

SYRIL S. TIPTON,

1220 Broadway Arcade Building, Los Angeles 13,

PATRICK H. FORD,

907 Van Nuys Building, Los Angeles 14,

Attorneys for Appellants.

FILED
JUL 27 1948

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No. 12127

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Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employes Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

PETITION FOR REHEARING.

Pursuant to Rule 25 of this Court, the appellants respectfully petition for rehearing.

The decision was filed on June 28, 1949, together with the opinion of the Honorable Chief Judge, with the concurrence of Circuit Judge Bone. The grounds for rehearing are [1] that the opinion of the Court shows that the case was inadvertently decided on the basis of the interpretation and application of certain U. S. Code sections not really involved in the case; [2] that the opinion if allowed to stand, will create uncertainty in the law by leaving the impression that the Court regards the exclusionary provisions of U. S. Code, Title 33, Section 903(b) as controlling over the jurisdictional definition contained

in Section 902(2); [3] that the decision, if allowed to stand, will effectually strike from the law and render meaningless the provisions of Section 902(2) requiring that the injury or death arise out of and in the course of employment; and [4] that rules and construction require that the Courts consider the common law in order to find what changes Congress intended to enact in the theretofore governing rules. These four grounds will be argued together, as they relate to the same basic point.

ARGUMENT.

I.

Issue on Appeal Was Interpretation and Application of Section 902(2), 33 U. S. C.

The issue raised by appellants on this appeal is that the uncontroverted evidence and the facts as found by the Deputy Commissioner established that the decedent employee did not suffer "death arising out of and in the course of employment," within the meaning of 33 U. S. Code, Section 902(2), because an employee who violates the employer's specific order as to his work, in order to perform a personal errand or help a fellow-employee's wife, is not doing his job but is engaged in a frolic and detour of his own.

It is respectfully submitted that the Court has seriously erred in looking to Sections 903(b), 904(b) and 920(c) and (d) in construing Section 902(2). It is conceded that the act must be construed as a whole. However, Section 903(b) is obviously an exception to the rule of 902(2). That is, even if an employee is found to be acting within the course of employment, he is barred

under Section 903(b) if his injury is caused by intoxication or wilful self-infliction.

Section 904(b) is merely the standard Workmen's Compensation clause abolishing the negligence test of liability. It was not intended to broaden, narrow or change the law on course and scope of employment.

The presumptions of Section 920 are merely guides to procedure in cases where the employer claims the injury was self-inflicted or caused by drunkenness. These presumptions were not involved in the instant case.

Common Law.

It is respectfully submitted, further, that the common law cannot be disregarded in this case. The Congress used the phrase "course of employment." When so used without new definition, it is conclusively presumed that it was used to adopt the rules under the state statutes from which it had been copied. If there is no such guide to its meaning, then the statute would be void for uncertainty.

The *Cardillo v. Liberty Mut. Ins. Co.* case, 330 U. S. 469, which was quoted by the Court's opinion, was not a case on "frolic and detour." It was a case on whether an employee is in the course of employment while en route to work from the District of Columbia to Quantico, Virginia, where his employer required him to travel and paid him for the time. Many "common law" cases could be cited in support of the result of the case. No doubt Mr. Justice Murphy had in mind the fact that there was a conflict of authority in the several states on the application of the "course of employment" rule to such facts, and

the opinion of the Supreme Court turned toward the liberal view. The Supreme Court's opinion, it is submitted, did not purport to overrule the long-standing canon of construction that requires a Court to inquire, What was the law before this statute? What evil caused the statute? What change did Congress intend to enact?

Heydon's case (1584), 3 Coke 7a, 14 Eng. Rul. Cas. 816;

Denn v. Reid (1836), 10 Pet. 524, 9 L. Ed. 519;

U. S. v. Matthews (1899), 173 U. S. 381, 19 S. Ct. 413, 43 L. Ed. 738;

Holy Trinity Church v. U. S. (1892), 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (Spirit controls over letter of statute);

Smith v. Townsend (1893), 148 U. S. 490, 494, 13 S. Ct. 634, 37 L. Ed. 533, 534 (quoting *Heydon's case*);

Stewart v. Kahn (1871), 11 Wall. 493, 20 L. Ed. 176;

Bruce v. Ailesburg (H. L. 1892) [1892] A. C. 356, 62 L. T. N. S. 490, 14 Eng. Rul. Cas. 822.

It is respectfully submitted that there is no conflict of authority on this point, save and except that created by the instant case which introduces a novel and revolutionary extension of the meaning of the phrase "course of employment." Careful analysis of all precedents will show that a violation of orders may not take one beyond the scope of employment, but only where (1) the act being done was an act the employer required of the employee (who was merely violating the prescribed method), or (2) the order was a standing order (like "No Smoking"), which was customarily disregarded and unenforced.

There is no prior case of deliberate departure from the job the employee was supposed to be doing, to engage in a special act of service to a third party, in violation of specific orders just given, where a Court has held the act to be within the "course of employment."

It is submitted that the state and federal cases cited must be considered by this Court, for a proper application of the Act of Congress. The Act cannot be construed by mere reference to certain listed exceptions to liability, exceptions which were not involved and which are never involved unless and until the employee first proves that he was injured in the "course of employment."

Suppose an employee was injured while drunk, but while driving the employer's delivery truck on an authorized route at regular hours. No one could claim "frolic and detour." Course of employment would be undisputed. Liability could be excluded, however, if the employer could sustain the statutory burden of proof and if the Commissioner found that "the injury was occasioned solely by the intoxication of the employee," as provided in Section 903(b). But, suppose the employer saw the employee had been drinking but was not drunk and ordered him not to drive the truck, but the driver used it anyway to go to the drug store for a pack of cigarettes for personal use. Assume further that the drug store was adjoining the employer's premises and that the truck was involved in an accident solely due to a third party's negligence. There would be no question of the employee being intoxicated or of his condition being the *sole cause* of injury. Yet, he would not be in the course of employment under any fair and reasonable view of the standard phraseology of Workmen's Compensation legislation.

It is essential to a proper understanding and application of the Act, that the Court's opinion make clear that Section 902(2) is the basic test on the scope of liability, and that Sections 903 and 904 are specific exclusions, covering situations where "course of employment" is involved but liability is barred for other reasons.

A rehearing is necessary in this case to correct the opinion on file, and to reconsider the meaning of Section 902(2) within the applicable rules of statutory interpretation.

Conclusion.

A rehearing should be granted.

Respectfully submitted,

TIPTON & WEINGAND,
SYRIL S. TIPTON and
PATRICK H. FORD,

Attorneys for Appellants.

Certificate.

Pursuant to Rule 25 of this Court, appellant's counsel certify that in their judgment this petition is well founded and that it is not interposed for delay. Appellants are making and have made all current payments required by respondents and granting of rehearing will not stay execution of the award.

PATRICK H. FORD,
Of Counsel.

No. 12128

United States
Court of Appeals
for the Ninth Circuit

ALBERT ADELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

JAN 12 1949

PAUL R. O'BRIEN,
CLERK

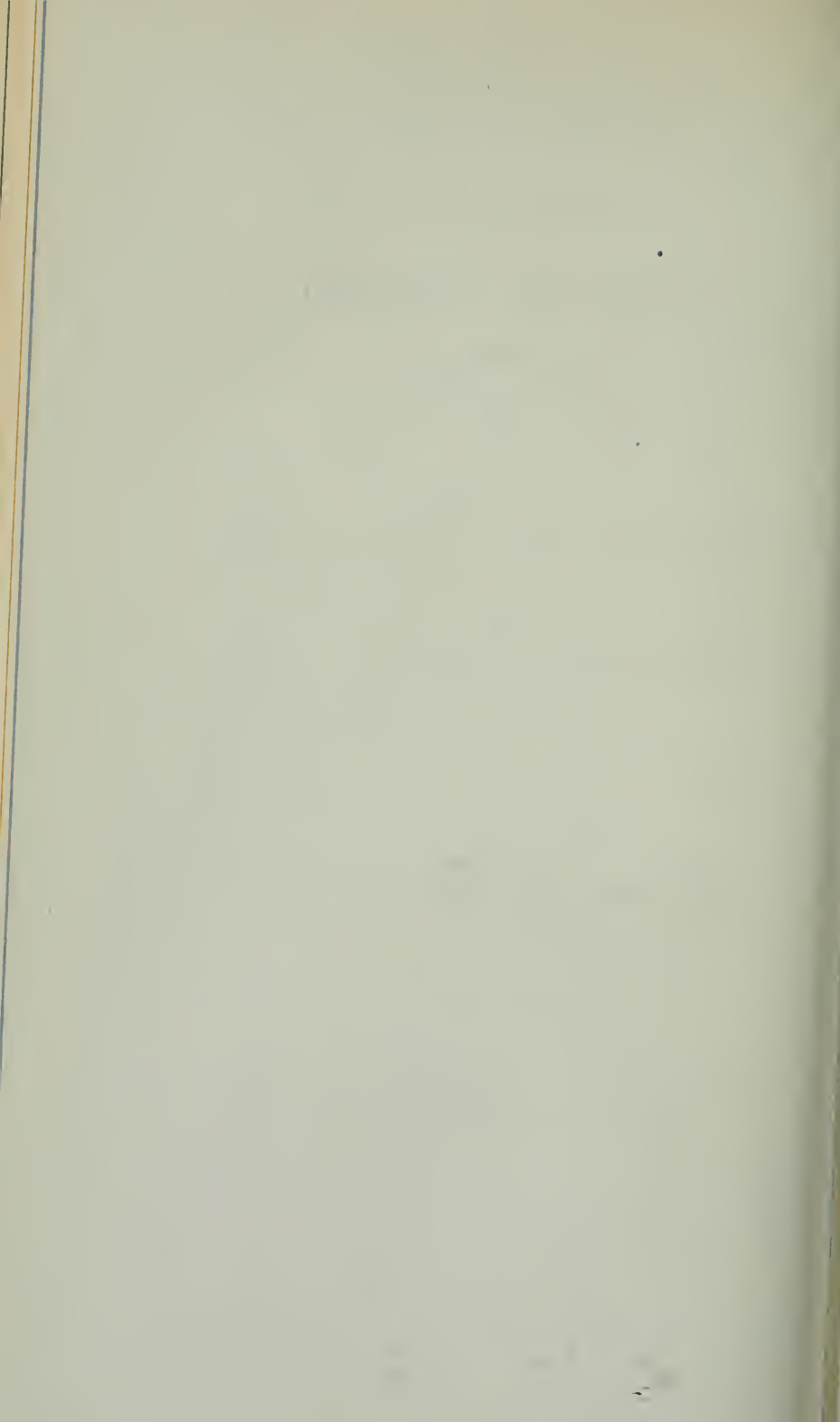
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

A. J. ZIRPOLI,

1101 Balfour Building,
San Francisco, California.

Attorney for Defendant and Appellant.

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

In the United States District Court, Northern
District of California, Southern Division.

No. 30076-G

THE UNITED STATES OF AMERICA

vs.

ALBERT ADELMAN

INDICTMENT

Harrison Narcotic Act and
Jones-Miller Act

A true bill,

HAROLD C. CLOUDMAN,
Foreman.

Presented in open court and ordered.

Bail, \$3,500.00.

[Endorsed]: Filed March 20, 1946.

[1 *]

[Title of District Court and Cause.]

FIRST COUNT

(Harrison Narcotic Act, 26 U.S.C. 2553 and 2557);

In the March, 1946, term of said Division of said District Court, the Grand Jurors thereof on their oaths, present that Albert Adelman, (whose full and true name is, other than hereinabove stated, to said Grand Jurors unknown, hereinafter called "said Defendant") on or about the 16th day of August, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium.

SECOND COUNT

(Jones-Miller Act, 21 U.S.C. 174)

And the said Grand Jurors, upon their oaths aforesaid, do further present; That at the time and place mentioned in the First Count of this indictment, in said Division and District, said defendant fraudulently and knowingly did conceal and facilitate the concealment of said lot of smoking opium in quantity particularly described as one 5-tael can of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew.

THIRD COUNT

(Harrison Narcotic Act, 26 U.S.C. 2553 and 2557)

And the Grand Jurors, upon their oaths aforesaid, do further present; That said defendant, on or about the 1st day of September, 1945, in the City and County of San Francisco, State of California, within said Division [2] and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium.

FOURTH COUNT

(Jones-Miller Act, 21 U.S.C. 174)

And the said Grand Jurors, upon their oaths aforesaid, do further present; That said Defendant, at the time and place mentioned in the Third Count of this indictment, in said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of said lot of smoking opium in quantity particularly described as one 5-tael can of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew.

/s/ FRANK J. HENNESSY,
United States Attorney.

Approved as to form:

RBMcM

[3]

District Court of the United States, Northern
District of California, Southern Division.

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 4th day of April, in the year of
our Lord one thousand nine hundred and forty-
six.

Present: The Honorable Louis E. Goodman, Dis-
trict Judge.

[Title of Cause.]

PLEA OF NOT GUILTY

This case came on regularly this day for entry
of plea. The defendant Albert Adelman was present
in proper person and with his attorney, Walter
Duane, Esq., Reynold H. Colvin, Esq., Assistant
United States Attorney, was present on behalf of
the United States.

The defendant was called to plead and thereupon
said defendant pleaded "Not Guilty" to the In-
dictment filed herein against him, which said plea
was ordered entered.

After hearing Mr. Duane and Mr. Colvin, it is
ordered that this case be continued to May 23,
1946, for trial. (Jury) [4]

District Court of the United States, Northern
District of California, Southern Division.

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Tuesday, the 11th day of June, in the year of
our Lord one thousand nine hundred and forty-
six.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL: SENTENCE

This case came on regularly this day for trial. James T. Davis, Esq., Assistant United States Attorney was present on behalf of the United States. The defendant Albert Adelman was present in Court with his attorney, Walter Duane, Esq. Thereupon the following named persons, viz: Mabel E. Lange, Lena J. Jacobsen, George B. Whaley, Earle H. LeMasters, Marie Brown, Herbert C. McCormick, Frank Marisch, John W. Osborn, James R. Scott, Paola Benetti, William N. Ricks, Samuel D. McFadden, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made a statement to the Court and jury on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibits Nos. 1 and 2. [5] G. E. Mallory, William H. Grady, Thomas E. McGuire and Jacob Leiberman were sworn and

testified on behalf of the United States. The United States then rested. Mrs. Albert Adelman and Albert Adelman were sworn and testified on behalf of the defendant, and the defendant rested. After argument by the attorneys and the instructions of the Court to the jury, the jury at 4:40 p.m. retired to deliberate upon its verdict. At 5:07 p.m. the jury returned into Court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict which was ordered filed and recorded, viz:

“We, the Jury, find as to the defendant at the bar as follows:

Guilty as to Count 1 of the Indictment

Guilty as to Count 2 of the Indictment

Guilty as to Count 3 of the Indictment

Guilty as to Count 4 of the Indictment

EARLE H. LeMASTERS,
Foreman.”

The jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. Ordered that the jury be excused from further consideration of this case and from attendance upon the Court until notified.

Mr. Duane made a motion for new trial and motion in arrest of judgment, which said motions were ordered denied.

The defendant was called for judgment. After hearing the defendant and the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pro-

nounced against him, and no sufficient cause to the contrary being shown or appearing to the Court
It Is By the Court

Ordered and Adjudged that the defendant Albert Adelman, having been adjudged Guilty by the verdict of the jury, be [6] and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years on the First Count of the Indictment; and be imprisoned for the period of three (3) years on the Second Count of the Indictment, term of imprisonment imposed on the Second Count to commence and run from and after the expiration of the term of imprisonment imposed on said defendant on the First Count of the Indictment; and be imprisoned for the period of two (2) years on the Third Count of the Indictment; and be imprisoned for the period of three (3) years on the Fourth Count of the Indictment, term of imprisonment imposed on defendant on the Fourth Count to commence and run from and after the expiration of the term of imprisonment on said defendant on the Third Count of the Indictment;

Further Ordered that the terms of imprisonment imposed on defendant on the Third and Fourth Counts run concurrently with those imposed on defendant on Counts One and Two of the Indictment.

Further Ordered that defendant pay a fine to the United States of America in the sum of One Hundred (\$100.00) Dollars on each of Counts Two

and Four of the Indictment, making a total fine of Two Hundred (\$200.00) Dollars.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Federal Penitentiary. [7]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to, the defendant at the bar, as follows:

Guilty as to Count 1 of the Indictment

Guilty as to Count 2 of the Indictment

Guilty as to Count 3 of the Indictment

Guilty as to Count 4 of the Indictment

EARLE H. LeMASTERS,
Foreman.

[Endorsed]: Filed June 11, 1946.

[8]

In the District Court of the United States, Northern
District of California, Southern Division

No. 30076-G

UNITED STATES

vs.

ALBERT ADELMAN

JUDGMENT AND COMMITMENT

Criminal Indictment in Four (4) Counts for violation Harrison Narcotic Act, 26 U.S.C. 2553 and 2557; Jones-Miller Act, 21 U.S.C. 174.

On this 12th day of June, 1946, came the United States Attorney, and defendant Albert Adelman appearing in proper person, and with counsel and,

The defendant having been adjudged guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: Viol. Title 26 U.S.C., Secs. 2553 and 2557, (Cts. 1 and 3) defendant did, on or about Aug. 16, 1945, and Sept. 1, 1945, sell smoking opium; Title 21 U.S.C., Sec. 174 (Cts. 2 and 4) defendant did, at above time and place, conceal lots of smoking opium, which had been imported into the United States of America, contrary to law and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General

or his authorized representative for imprisonment for the period of be imprisoned for the period of two (2) years on the First Count of the Indictment, and be imprisoned for the period of three (3) years on the Second Count of the Indictment; term of imprisonment imposed on the Second Count to commence and run from and after the expiration of the term of imprisonment imposed on said defendant on the First Count of the Indictment; and be imprisoned for the period of two (2) years on the Third Count of the Indictment; and be imprisoned for the period of three (3) years on the Fourth Count of the Indictment; term of imprisonment imposed on defendant on the Fourth Count to commence and run from and after the expiration of the term of imprisonment imposed on said defendant on Third Count of the Indictment;

Further Ordered that terms of imprisonment imposed on defendant on the Third and Fourth Counts run Concurrently with those imposed on defendant on Counts One and Two of the Indictment; Further ordered that defendant pay a fine to the United States of America of One Hundred Dollars (\$100.00) on each of Counts numbered Two and Four of the Indictment.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer

and that the same shall serve as the commitment herein. Examined by

/s/ LOUIS E. GOODMAN,
United States District Judge.
JAMES T. DAVIS,
Asst. U. S. Attorney.

The Court recommends commitment to Federal Penitentiary.

Filed and Entered this 12th day of June, 1946.
C. W. Calbreath, Clerk.

Entered: Vol. 37, Page 340, Judgment Book. [9]

[Title of District Court and Cause.]

MOTION TO CORRECT JUDGMENT
AND SENTENCE

Comes now the defendant, Albert Adelman, by and through his attorney, A. J. Zirpoli, and respectfully moves the above-named Court to correct and set aside the judgment and sentence imposed on Counts I and III of the above entitled cause upon the following grounds:

1. That the said sentence was imposed in violation of the Constitution and laws of the United States.

2. That the said Court was without jurisdiction to impose sentence on Counts I and III of the indictment.

3. That Counts I and III of the indictment upon which said sentence was imposed are and each of them is void.

4. That Counts I and III of the indictment fail to state facts sufficient to constitute an offense against the United States.

Said motion will be made upon all the papers and records [10] on file herein.

Dated October 21, 1948.

A. J. ZIRPOLI,
Attorney for Defendant.

[Endorsed]: Filed Oct. 21, 1948. [11]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO CORRECT
JUDGMENT AND SENTENCE

The motion is to correct the judgment and sentence of June 12, 1946, by vacating the sentences imposed under Counts I and III of the indictment (Harrison Narcotic Act 26 U.S.C. 2553, 2557) upon the ground that these Counts do not charge a legal offense against the United States.

I am of the opinion that Counts I and III do charge an offense against the United States.

The Congress has power to tax a prohibited import and hence the charge is valid. *U. S. v. Yugonovich*, 256 U. S. 450, 463.

The argument that the Jones Miller Act of 1922 (21 [12] U.S.C. 174) repealed by implication the tax on smoking opium previously imposed by the Harrison Narcotic Act, is not, in my opinion, good. *McCool v. Smith*, 66 U. S. 459, 470; *United States*

v. Tynen, 78 U. S. 88, 92; Frost v. Wenie, 157 U. S. 46, 58; United States v. Greathouse, 166 U. S. 601, 605; United States v. Yuginovich, 256 U. S. 450, 463; United States v. Noce, 268 U. S. 613, 617; Posadas v. National City Bank, 296 U. S. 497, 503; United States v. Jackson, 302 U. S. 628, 631; United States v. Borden Co., 308 U. S. 188, 198; United States Alkali Ass'n v. U. S. 325 U. S. 196, 209.

The motion is denied.

Dated November 24, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 26, 1948.

[13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Albert Adelman, United States Penitentiary, McNeil Island, Washington.

Name and Address of Appellant's Attorney: A. J. Zirpoli, 1101 Balfour Building, San Francisco, California.

Offense: Count 1 of Indictment—Violation of 26 U.S.C.A. Sections 2553, 2557 (Harrison Narcotic Act) by unlawfully selling, dispensing and distributing not in and from the original stamped package a lot of smoking opium.

Count 3 of Indictment—Violation of 26 U.S.C.A. Sections 2553, 2557 (Harrison Narcotic Act) by

unlawfully selling, dispensing and distributing not in and from the original stamped package a lot of smoking opium.

Concise Statement of Judgment or Order Giving Date and Any Sentence: This appeal is from the order of Honorable Louis E. Goodman, United States District Judge of the above-entitled Court, made on November 24, 1948, and entered and filed on November 26, 1948, denying appellant's motion to correct the judgment and [14] sentence of June 12, 1946, by vacating the sentences imposed under Counts 1 and 3 of the indictment.

Name of Institution where now Confined, if not on Bail: The appellant, Albert Adelman, is now confined in the United States Penitentiary at McNeil Island, Washington.

The above-named appellant hereby appeals to the United States Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, November 30, 1948.

A. J. ZIRPOLI,

Attorney for Appellant.

[Endorsed]: Filed Dec. 3, 1948.

[15]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL AND STATEMENT OF POINTS ON WHICH HE INTENDS TO RELY ON APPEAL

Comes now the appellant and hereby designates the following portions of the record, proceedings

and evidence to be contained in the record on appeal:

1. The indictment.
2. Minutes of April 4, 1946, showing plea of not guilty by the defendant.
3. Minutes of June 11, 1946.
4. The verdict.
5. Judgment and commitment.
6. Motion to correct judgment and sentence.
7. Order denying motion to correct judgment and sentence.
8. Notice of appeal.
9. Appellant's designation of contents of record on appeal and statement of points on which he intends to rely on appeal. [16]

The following constitutes a concise statement of the points on which appellant intends to rely on appeal:

I.

That the Court erred in its order of November 24, 1948, denying appellant's motion to correct the judgment and sentence.

II.

That the judgment and sentence of June 12, 1946, on the first count of the indictment is void.

III.

That the judgment and sentence of June 12, 1946, on the third count of the indictment is void.

IV.

That the first count of the indictment fails to allege an offense against the United States.

V.

That the third count of the indictment fails to allege an offense against the United States.

Dated San Francisco, California, November 30, 1948.

A. J. ZIRPOLI,
Attorney for Appellant.

[Endorsed]: Filed Dec. 3, 1948.

[17]

District Court of the United States,
Northern District of California.

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to . . . , inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of *The United States of America, vs. Albert Adelman*, No. 30076-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$1.70 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of December, A.D. 1948.

(Seal)

C. W. CALBREATH,

Clerk.

[18]

[Endorsed]: No. 12128. United States Court of Appeals for the Ninth Circuit. Albert Adelman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 15, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit.

No. 12128

ALBERT ADELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF (RULE 19)

Comes now the appellant in the above-entitled appeal and presents his statement of points on appeal and designates the portions of record he considers necessary for the consideration thereof.

POINTS ON APPEAL

Appellant herewith presents the following as the statement of points on which he intends to rely on the appeal:

I.

That the Court erred in its order of November 24, 1948, denying appellant's motion to correct the judgment and sentence.

II.

That the judgment and sentence of June 12, 1946, on the first count of the indictment is void.

III.

That the judgment and sentence of June 12, 1946, on the third count of the indictment is void.

IV.

That the first count of the indictment fails to allege an offense against the United States.

V.

That the third count of the indictment fails to allege an offense against the United States.

DESIGNATION OF PARTS OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF

Appellant herewith designates the entire transcript of the Clerk's record from the Court below and docketed herein as necessary for the consideration of his appeal.

The foregoing statement of points on appeal and designation of record which appellant deems necessary for a consideration of said appeal is respectfully presented and filed in compliance with Rule 19, Subdivision 6 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit.

/s/ A. J. ZIRPOLI,

/s/ JOHN L. SULLIVAN,

Attorneys for Appellant.

[Endorsed]: Filed December 20, 1948. Paul P. O'Brien.

No. 12,128

IN THE
United States Court of Appeals
For the Ninth Circuit

ALBERT ADELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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FILED

JAN 26 1949

PAUL P. O'BRIEN,
CLERK

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No. 12,128

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALBERT ADELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division (hereinafter referred to as the "Court below"), denying appellant's motion to correct the judgment and sentence (T. 13). The Court below had jurisdiction of the motion to correct its judgment and sentence under the provisions of Section 2255 of Title 28, United States Code (Judicial Code and Judiciary). Jurisdiction to review the order of the Court below denying the motion to set aside and correct the sentence is conferred upon this Court by said Title 28, United States Code, Section 2255.

OPINION BELOW.

The opinion of the Court below is incorporated in its order denying motion to correct judgment and sentence and appears in the transcript of record at pages 13 and 14.

STATEMENT OF THE CASE.

In the March, 1946 term of the Southern Division of the United States District Court for the Northern District of California, the Grand Jurors presented an indictment in four counts against appellant (hereinafter referred to as "defendant") (T. 3 and 4). The first count of the indictment charged a violation of the Harrison Narcotic Act, 26 USC 2553 and 2557. The second count of the indictment charged a violation of the Jones-Miller Act, 21 USC 174. The third count of the indictment charged a violation of the Harrison Narcotic Act, 26 USC 2553 and 2557. The fourth count of the indictment charged a violation of the Jones-Miller Act, 21 USC 174.

On June 12, 1946, the defendant, having been found guilty by a verdict of a jury on all four counts of the indictment (T. 7) was sentenced by the Honorable Louis E. Goodman, District Judge of the United States District Court, Northern District of California, Southern Division, to a term of two years on the first count of the indictment, three years on the second count of the indictment, two years on the third count of the indictment, and three years on the fourth count of the indictment. The term of imprisonment imposed

on the second count to commence and run from and after the expiration of the term of imprisonment imposed on the first count, and the term of imprisonment imposed on the fourth count to commence and run from and after the expiration of the term of imprisonment imposed on the third count. The terms of imprisonment on the third and fourth counts to run concurrently with those imposed on the first and second counts (T. 8-9).

The defendant is now at McNeil Island Penitentiary at Steilacoom, Washington, serving the sentences imposed by the Court.

A motion to correct the judgment and sentence by setting aside the judgment and sentence imposed on Counts One and Three of the indictment was filed in the Court below (T. 12).

This motion was denied (T. 13-14).

From the denial of the motion an appeal has been taken (T. 14).

The motion to correct the judgment and sentence pertains to the first and third counts of the indictment which read as follows:

FIRST COUNT: (Harrison Narcotic Act, 26 USC 2553 and 2557) . . . said Defendant on or about the 16th day of August, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium. . . . (T. 3).

THIRD COUNT: (Harrison Narcotic Act, 26 USC 2553 and 2557) . . . said defendant, on or about the 1st day of September, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium. . . . (T. 4).

Notice that the third count of the indictment is identical with the first count except that the date of the offense in the third count is September 1, 1945, and the date of the offense in the first count is August 16, 1945.

SPECIFICATION OF ERRORS.

The following is a specification of the errors relied upon by appellant:

I.

That the Court erred in its order of November 24, 1948, denying appellant's motion to correct the judgment and sentence.

II.

That the judgment and sentence of June 12, 1946, on the first count of the indictment is void.

III.

That the judgment and sentence of June 12, 1946, on the third count of the indictment is void.

IV.

That the first count of the indictment fails to allege an offense against the United States.

V.

That the third count of the indictment fails to allege an offense against the United States.

CONTENTION OF APPELLANT.

Appellant respectfully contends that the first and third counts of the indictment fail to allege an offense against the United States, that the judgment and sentence on each of said counts is void and that the Court below, therefore, erred when it entered its order denying the motion to correct and set aside the judgment and sentence on said counts.

ARGUMENT.

The first and third counts of the indictment do not charge a legal offense against the United States under the law. We do not attack the validity of the sentences under Counts II and IV because the defendant is entitled to his release since September 28, 1948.

Based upon our position that Counts I and III do not constitute a legal offense under the laws of the United States, because of the earned good-time credits provided for by Section 710 of Title 18, U.S.C.A., on and after September 28, 1948, defendant was and is

being illegally restrained of his liberty and is entitled to his immediate release.

Counts I and III of the indictment do not state an offense under the law. The wording of the indictment in both the first and third counts of the indictment is as follows:

. . . said defendant . . . unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium.

The Harrison Narcotic Act is purely a revenue measure and as such its control over matters which are by the Constitution left to the States must be limited to enforcing the collection of revenue.

This statute purports to be passed under the authority of the Constitution, Article I, Section 8, which gives the Congress the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense, and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

United States v. Doremus, 249 U.S. 86.

The act is not a licensing act whose aim is to control the dispensing of narcotics by confining the dispensation to proper persons, for that is an exercise of the police power not possessed as to the opiates by Congress. The act rests upon the power to tax and its provisions for registration and its restrictions on the dispensation of narcotics are for the purpose of safeguarding the tax on the dispenser and on the drug.

Starnes v. Rose, 282 Fed. 336;

United States v. Anthony, 15 F. Supp. 553;
Nigro v. United States, 117 F. 2d 624.

The narcotic law is essentially a revenue measure and its provisions must be reasonably applied with the primary view of enforcing the special tax. . . . Federal power is delegated and its prescribed limits must not be transcended even though the end seems desirable. . . .

Congress cannot, under pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. . . . Any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally or reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the States, is invalid and cannot be enforced.

In other words, *the Harrison Act is strictly a revenue measure*. It provides for the taxing of certain articles, and lays down punishment for those who have not paid the tax *on the articles for which a tax must be paid*. *Its provisions were never intended to affect those persons who deal in articles for which no tax is assessed*.

There is no tax on smoking opium; therefore the Harrison Act has no provisions covering the sale and dispensing of smoking opium.

The first and third counts of the indictment were based on Section 2553 of Title 26 U.S.C., but Section 2550 of the same title must also be included because

of the reference to that section made in Section 2553. Section 2557 of the same title deals with the penalties to be imposed on those violating the provisions of the previous sections.

Section 2550. Tax . . . (a) Rate . . . There shall be levied, assessed, collected, and paid upon opium, coco leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce. . . .

Section 2553. Packages . . . (a) General requirement. . . . It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package. . . .

Section 2557. Penalties. . . .

It is true that Section 2550 says "opium . . . any compound, salt, derivative, or preparation thereof", but this section *was never intended to refer, and does not refer, to smoking opium* and in particular *imported* smoking opium. Note the following opinion laid down by the Attorney General of the United States:

The next inquiry, therefore, is whether or not the said act of February 9, 1909, changed the law in this respect. Section #1 of the act provides:

"That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof. . ." except that all forms or derivatives other than smoking opium may be imported for medicinal purposes.

Inasmuch, therefore, as the importation of smoking opium is by this statute absolutely prohibited, the necessary effect thereof was to repeal by implication all provisions of the tariff law relating thereto. *If it cannot be imported at all, certainly no revenue can be collected upon its importation.* Moreover, that it was intended that no revenue should be derived therefrom *even when smuggled into the United States*, is shown by that clause of the second section of said act, which provides that opium, when unlawfully imported, shall be forfeited, and when seized shall be destroyed and not sold, as would be necessary if it were subject to taxation. (Italics added.)

Opinions of the Attorney General, Vol. 27, p. 445.

This opinion of the Attorney General refers to the Act of 1909, Section #1, c. 100. This act was amended by Section 1 of Act of May 26, 1922. This new and latest provision which is in effect today and at the time that the defendant was indicted is set forth in 21 USC 173 as follows:

Section 173: It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coco leaves as the board finds to be *necessary to provide for medical and legitimate uses only*, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations

shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall

(1) *If smoking opium or opium prepared for smoking be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character. (Italics added.)*

Although the wording of this new act quoted above is different from the original act of 1909 which is quoted in the Attorney General's opinion and upon which his opinion is based, *the provisions and the terms of the two acts are identical. The logic and the reasoning of the Attorney General is clearly as applicable to this new act as it was to the old act of 1909 upon which the opinion was based.*

There is no duty on smoking opium and there can be no revenue collected upon it. By the Jones-Miller Act, Section 173 of which is quoted above, it is unlawful to import any narcotic drug into the United States except those which the board may find necessary for medical or legitimate uses.

But there are no medical or legitimate uses for smoking opium, and as stated in the law its importation is absolutely prohibited.

. . . it is quite apparent, however, that opium prepared for smoking is neither a preparation

nor a remedy within the meaning of this provision, and it is further apparent that it is not sold or distributed as medicine, and not for the purpose of evading the provisions of the act.

Ng Sing et al. v. United States, 8 Fed. 2d 919.

The Court will take judicial notice of the fact that "smoking opium" or "opium prepared for smoking" is neither a remedy nor a preparation sold as a medicine.

Chin Gum v. United States, 149 Fed. 2d 575.

It may be seen by examination of subdivision #1 of Section 173, Title 21 (quoted above), that even if smoking opium is smuggled into the United States it shall summarily be forfeited without the necessity of forfeiture proceedings by the government. This clearly shows that it was intended that no revenue should be derived from smoking opium even when it is smuggled into the United States, and that no legitimate use should be made thereof as is done with other seized narcotics.

There is no tax on smoking opium. There is no "original stamped package" of smoking opium, and this is particularly true of imported smoking opium. If there is no assessed duty, then one cannot be guilty of failing to pay that duty which does not exist.

The words of the Harrison Act under which the defendant was indicted, "any compound, salt, derivative, or preparation" of opium for which a tax is provided by Section 2550 have no reference to *smoking* opium, but only those derivatives of opium which

have a medical value and are by law subject to tax. It has been universally held (as in *Chin Gum v. United States*, supra), that smoking opium is not a medicine and has no medical value and that it is not taxable (see Opinion of Attorney General quoted above).

Also note the following opinion:

Appellant could not be held for the failure to apply and cancel a stamp which never existed. If it did exist, it rested upon the government to show that fact.

Chin Sing v. United States, 227 Fed. 397.

It is true that there is a statute regarding the taxing of the *manufacture* of smoking opium.

Title 26 USC, Section 2567: Tax: (a) Rate: An internal revenue tax of \$300. per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes.

(b) How paid:

(1) Stamps. All opium prepared for smoking manufactured in the United States shall be duly stamped in such a permanent manner as to denote the payment of the internal revenue tax thereon.

This statute has no application to the cause at hand. The defendant was not indicted under this statute (2567) for manufacturing smoking opium without paying the tax thereon, he was indicted for "selling, dispensing, and distributing" smoking opium under the Harrison Narcotic Act (2550 and 2553).

Count II of the defendant's indictment states the opium which he allegedly sold etc. had been "imported

into the United States''. The above statute (2567) applies only to opium manufactured in the United States.

Section 2553 and Section 2557 of the Harrison Narcotic Act under which the defendant was indicted in Counts I and III should have all doubts concerning the meaning of its language resolved in favor of the defendant.

In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent.

Harrison v. Vose, 9 How. (US) 372, 13 L.E. 179.

The operation and scope of criminal laws should not be enlarged by implication, but they should be strictly construed; and, where there is any well-founded doubt as to any act being a public offense . . . it should not be declared such, but should rather be construed in favor of the liberty of the citizen.

In re Rahrer, 43 Fed. 556.

Also see:

United States v. One 6-54-B Oakland Touring Automobile, 9 Fed. 2d 635.

*In proceeding to forfeit automobile for transporting cocaine, imported unlawfully and without paying duty, count based on Rev. St. #3450 (Comp. St. #6352), which relates to internal revenue taxes alone, is unsupportable, inasmuch

*The above are headnotes, not quotations.

as there are no internal revenue taxes on imported cocaine; those imposed by Harrison Anti-Narcotic Act (Comp. St. #6287-g) being impliedly repealed by passage of subsequent act (Comp. St. #8801) prohibiting importation.

Statute sanctioning activities and incidentally taxing them is irreconcilable with and repealed throughout by subsequent statute prohibiting activities without any saving clause to perpetuate taxes.

CONCLUSION.

It is respectfully submitted that from the above-quoted authorities and by strict construction of the statutes (26 USC 2553 and 2557) it conclusively appears that neither Count I nor III of the indictment under which the defendant was sentenced charges an offense against the United States. This Court has no alternative but to set aside the sentence imposed upon the said counts and to order the Court below to forthwith enter said correction in the records of these proceedings and direct the Clerk of said Court to forthwith forward a certified copy of said correction to the Warden of the United States Penitentiary at McNeil Island, Washington.

Dated, San Francisco, California,
January 26, 1949.

Respectfully submitted,

A. J. ZIRPOLI,

JOHN J. SULLIVAN,

Attorneys for Appellant.

No. 12,128

IN THE

United States Court of Appeals
For the Ninth Circuit

ALBERT ADELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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PAUL A. DIERICK



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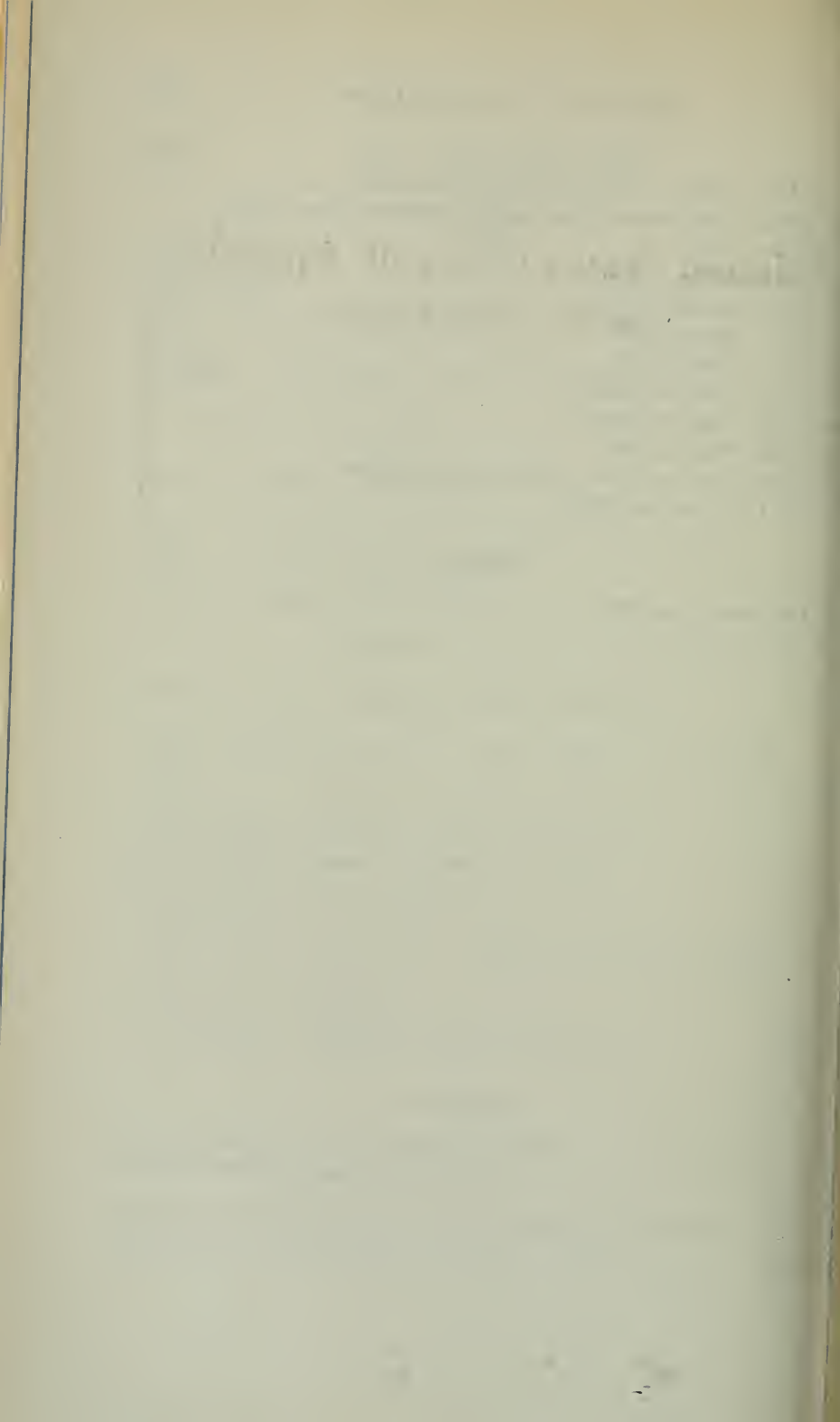
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No. 12,128

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALBERT ADELMAN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, hereinafter called the Court below, denying appellant's motion to correct the judgment and sentence heretofore imposed against him. (Tr. 13.) The Court below had jurisdiction of the motion to correct its judgment and sentence under the provisions of Title 28 U.S.C.A., Section 2255. This Honorable Court has jurisdiction to review the order of the Court below denying the motion herein under authority of said Title 28 U.S.C.A., Section 2255.

OPINION BELOW.

The opinion of the Court below, which is incorporated in its order denying motion to correct judgment and sentence, reads as follows:

“ORDER DENYING MOTION TO CORRECT JUDGMENT AND SENTENCE.

“The motion is to correct the judgment and sentence of June 12, 1946, by vacating the sentences imposed under Counts I and III of the indictment (Harrison Narcotic Act, 26 U.S.C. 2553, 2557) upon the ground that these Counts do not charge a legal offense against the United States.

“I am of the opinion that Counts I and III do charge an offense against the United States.

“The Congress has power to tax a prohibited import and hence the charge is valid. *U. S. v. Yuginovich*, 256 U. S. 450, 463.

“The argument that the Jones Miller Act of 1922 (21 U.S.C. 174) repealed by implication the tax on smoking opium previously imposed by the Harrison Narcotic Act, is not, in my opinion, good. *McCool v. Smith*, 66 U.S. 459, 470; *United States v. Tynen*, 78 U.S. 88, 92; *Frost v. Wenie*, 157 U.S. 46, 58; *United States v. Greathouse*, 166 U.S. 601, 605; *United States v. Yuginovich*, 256 U.S. 450, 463; *United States v. Noce*, 268 U.S. 613, 617; *Posadas v. National City Bank*, 296 U.S. 497, 503; *United States v. Jackson*, 302 U.S. 628, 631; *United States v. Borden Co.*, 308 U.S.

188, 198; United States Alkali Assn. v. U.S., 325 U. S. 196, 209.

“The motion is denied.

“Dated November 24, 1948.

LOUIS E. GOODMAN,
United States District Judge.

(Endorsed): Filed Nov. 26, 1948.” (Tr. 13, 14).

STATEMENT OF THE CASE.

Appellant was convicted in 1946 on an indictment in four counts, two of which charged violations of 26 U.S.C. 2553 (Harrison Narcotic Act) and two charged violations of 21 U.S.C. 174 (Narcotic Drug Import-Export Act). Appellant was sentenced to two years on the first count, and three years on the second count, to run consecutively, also to like terms on the third and fourth counts, to run concurrently with the sentences under the first and second counts. He now contends that the first and third counts, based under Section 2553 supra, do not charge legal offenses claiming that he could not be lawfully charged with unlawfully selling, dispensing or distributing smoking opium not in or from the original stamped package as charged in those counts, since there is no duty or tax on smoking opium and there is no “original stamped package” for smoking opium.

QUESTION.

Do the first and third counts of the indictment allege an offense against the United States?

CONTENTION OF APPELLEE.

The answer to the above stated question is: Yes.

ARGUMENT.

In substance, the basis of appellant's contention is that the Narcotic Drug Import-Export Act repealed by implication the laws of Congress imposing duty on imported smoking opium and as well the internal revenue tax on smoking opium produced in or imported into the United States. If this position is sound, then it would appear that no part of the Harrison Narcotic Act and its amendments would apply to imported prepared smoking opium. Likewise, the common practice of indicting on the separate counts, as here, would be improper.

It is fundamental that Congress may tax what it prohibits. *License Tax Cases*, 5 Wall. 462; *United States v. Yuginovich*, 256 U.S. 450; *In re Kollock*, 165 U.S. 526, and *United States v. Jin Fuey Moy*, 241 U.S. 394. Furthermore, repeals by implication are not favored. *McCool v. Smith*, 66 U.S. 459; *United States Alkali Export Association v. United States*, 325 U.S. 196, and others to like effect, cited by the Court below in its opinion.

Where such doctrine is applied by the Courts, usually the subsequent statute contains a smaller or different penalty for the violation denounced therein. *United States v. Yuginovich*, supra. As stated in *United States v. Tynen*, 78 U.S. 88, where there are two acts on the same subject, the latter embracing all the provisions of the first and new provisions with different penalties are provided, the latter act repeals the former. The penalty for violating the Narcotic Drug Import-Export Act is not more than \$5,000.00 fine and not more than ten years in prison, whereas the punishment under the Harrison Narcotic Act for the offense charged is not more than \$2,000.00 fine or not more than five years imprisonment or both. The former is based on Congressional power to control imports, while the latter is based on the revenue raising power, one prohibiting imports and the other taxing the product imported or produced. Thus, we have a different subject matter. However, where the subsequent statute is repugnant to the former, the earlier statute may well be considered to have been repealed by implication, unless there is a saving clause as stated in *United States v. One 6-54-B Oakland Touring Automobile* (D.C.) 9 F. (2d) 635. This of course would be subject to whether or not Congress had or has otherwise indicated an intention to the contrary. It is noted that the automobile was forfeited on other grounds. Furthermore, the statute imposing taxes on imported opium, etc. (26 U.S.C. 2550 (a)) was reenacted subsequent to this decision. Hence, we believe the intent not to effect repeal thereby is shown.

It should be noted in this connection that the original law prohibiting the importation of smoking opium was enacted in 1909, although it was amended and extended by the Narcotic Drug Import-Export Act in 1922, whereas the provision taxing opium, derivatives, or preparations thereof was imposed by the Harrison Narcotic Act in 1914, and is now 26 U.S.C. 2550(a). Furthermore, it should be noted as stated, that the Harrison Narcotic Act was amended from time to time in other respects and re-enacted as amended on several occasions since 1922, and retained the same provision imposing internal revenue taxes on imported opium, its derivatives and preparations therefrom, making no distinction therein between medicinal or non-medicinal products, or legal or illegal narcotics in that respect. It would be a strange application of the principle of repeal by implication to hold that a prior statute relating to and prohibiting imports repealed a subsequent statute imposing internal revenue taxes on smoking opium produced in or imported into the United States. Furthermore, it is noted that the Harrison Narcotic Act of 1914, which with its various amendments is the anti-narcotic law of today, was held not to affect the Act of January 17, 1914, amending the 1909 Act prohibiting importations of smoking opium and other narcotic drugs not intended for medical or scientific use. See *Gee Woe v. United States* (C.C.A. 5), 250 Fed. 428. Also, it is interesting to note that an early case, *Marks v. United States* (C.C.A. 2-1912), 196 Fed. 476, held that the 1909 Act prohibiting the importation of

opium for other than medical purposes did not repeal the Internal Revenue Act of October 1, 1890, taxing and regulating the manufacture of smoking opium.

The tax is imposed by the Harrison Act (now 26 U.S.C. 2550 (a)) on such articles produced in or imported into the United States and sold or removed for consumption or sale. In the meantime, to-wit, in 1922, the Narcotic Drug Import-Export Act was adopted by Congress and is really a re-enactment and extension of the old 1909 Act referred to above. Said Section 2550(a) contains a provision that the tax on opium and preparations thereof, etc., are in addition to any duties. The Harrison Narcotic Act as stated, was amended in other regards, but the tax on opium, its derivatives and preparations thereof remained. In that connection it also is interesting to note Paragraphs 36 and 59, Title 19 U.S.C. 1001. (Schedule 1, Par. 36 and 59, Tariff Act of 1930, and Schedule 1, Par. 36 and 60, Tariff Act of 1922.) The latter paragraph contains a provision to the effect that it shall not repeal or affect the Narcotic Drug Import-Export Act. Those paragraphs retain the import duties on cocoa leaves and opium and derivatives. One of these tariff acts was adopted in 1922 at approximately the same time as the Narcotic Drug Import-Export Act and the other in 1930.

Appellant's counsel cites 27 Op. Atty. Gen. 445 to support his point. This opinion held that the bringing of smoking opium to a port in the United States for transfer to another boat in the same port for re-shipment abroad, did not constitute an importation

within the meaning of the customs laws; that prior to the Act of February 9, 1909, opium could not be brought into a port of this country and so exported without being subject to duty and that the Act of February 9, 1909, repealed by implication the prior law imposing duty on the smoking opium. This opinion was confined to the question of "duty" and was rendered prior to the passage of the Harrison Narcotic Act which imposed the internal revenue tax on all opium or derivatives thereof imported into or produced in the United States. It is noted that this opinion as explained therein was at variance with the case of *McLean v. Hager*, 31 Fed. 602, in the Northern District of California. Also, the necessity of passing on the question of repeal when holding that the situation did not constitute importation, is not clear. It is not believed that this opinion should be particularly persuasive here, especially since it is noted that the smoking opium could have been shipped across the United States and shipped out through another port lawfully, without incurring duty, but through a quirk in the law, there was no provision authorizing the transfer of opium from one boat to another in the same port. Then too, it should be noted, that the Attorney General was dealing with a law prohibiting imports as affecting a law imposing duty on imports, whereas the appellant now seeks to apply a law prohibiting imports to a law imposing an internal revenue tax.

While it is true, as stated by appellant's counsel, that 26 U.S.C. 2567 (Smoking Opium Act) has no

direct application here, this Act does impose a heavy tax on smoking opium made in this country and regulates such business. It has been in the statutes of the United States since 1914. It would be strange indeed that Congress intended to repeal by implication the internal revenue tax on imported smoking opium through the laws prohibiting its importation and leave the tax on the locally manufactured product. This should be an indication that Congress had no such intention. Aside from the revenue raising purpose of the Harrison Narcotic Act, there is an underlying purpose of restricting the illicit use of all forms of narcotics and preparations therefrom. Therefore, is it not unreasonable to conclude that Congress intended to free imported smoking opium from the tax and other regulatory provisions of the Harrison Narcotic Act as re-enacted? This is true despite the fact that the importation of smoking opium is prohibited and its legal manufacture in the United States is impractical since it is subject to seizure and summary forfeiture after having been imported or produced. However, if manufactured, the law does require it to be in appropriate stamped packages and hence the provisions in 26 U.S.C. 2553(a) may be invoked where a person sells, distributes, etc., such product from other than an original stamped package. The Bureau of Narcotics advises that such stamps exist, but none are used. No one wants them because of the other involvements resulting from the possession, etc., of smoking opium. Furthermore, the existence or availability of such stamps were matters, we believe, more appropriate for proof at the trial.

The case of *Ng Sing, et al. v. United States* (C.C.A. 9), 8 F. (2d) 919, quoted from by appellant's counsel, when read in its entirety, is favorable to the Government's position in the instant case. In that case the indictment was in two counts upon which the defendant was convicted. Although the citations of the statutes involved have been changed through codification, actually the same situation (separate counts under the same separate statutes) was presented to the appellate court there as here. The conviction on both counts was sustained, but it must be admitted that the court did not discuss repeal by implication.

It may be admitted that smoking opium as indicated in the *Ng Sing* case and *Chin Gum v. United States* (C.C.A. 1), 149 F. (2d) 575, also cited by appellant's counsel, is neither a remedy nor preparation sold as a medicine. However, we find no comfort for the defendant here in that case. *Chin Gum* was indicted for selling opium prepared for smoking without the appropriate order form under 26 U.S.C. 2554(a), which provides:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in Section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

It will be noted that Section 2550(a) is the very same section imposing the tax on opium, or preparations thereof, referred to in Section 2553(a), vio-

lation of which the contested count in the instant indictment charged, and the very same type of drug likewise was involved. Although stating as indicated above, that opium prepared for smoking is synonymous with smoking opium, the Court held that smoking opium or opium prepared for smoking are not within the exemptions in 26 U.S.C. 2551 (applicable to the provisions of Section 2550(a) and other provisions of Chapter 23, Internal Revenue Code and providing the only such exemptions.) It was to the contention by *Chin Gum* that the smoking opium was not proven as not being within such exemptions, that the appellate court, citing the *Ng Sing* case in sustaining his conviction, took judicial notice that smoking opium was not a remedy or preparation sold as a medicine, and hence not within the exemptions in Section 2551. While the section upon which the *Chin Gum* indictment was founded is not the same as here, it is manifest that if the smoking opium was not within the purview of Section 2550(a), there would have been no need for an order form, and if, as held by that Court of Appeals, smoking opium is a preparation within the meaning of Section 2550(a), no logical reason exists for concluding that the tax imposed by that section thereon is non-existent. Thus, there being a tax under Section 2550(a) on smoking opium imported into or produced in the United States, failure to comply with Section 2553(a) constitutes a separate and distinct law violation.

SUMMARY.

In summing up the appellee's position, the following salient points are respectfully called to the Court's attention:

1. That Congress may tax what it prohibits.
2. That repeals by implication are not favored.
3. That the subsequent re-enactments of the several laws are indicative that no repeal was intended.
4. That the internal revenue tax on narcotics is laid on legal or illegal narcotics without regard to their medicinal qualities, or the legal or illegal importation or manufacture thereof.
5. That the general history of the anti-narcotic laws shows no intent of Congress to repeal the tax on illicit narcotics and thus renounce its constitutional revenue raising power to deal internally with such articles, upon which power the Harrison Narcotic Act was founded.
6. That smoking opium is a preparation of opium within the meaning of 26 U.S.C. 2550.
7. That to avoid the consequences of 26 U.S.C. 2553, the narcotic drug must be dealt in, or from, the original stamped package.
8. That the offenses charged in the indictment are different and the sentence imposed by the court was within its judicial discretion and not excessive.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below denying appellant's motion to correct judgment and sentence is correct, and should be affirmed.

Dated, San Francisco, California,
February 24, 1949.

Respectfully submitted,

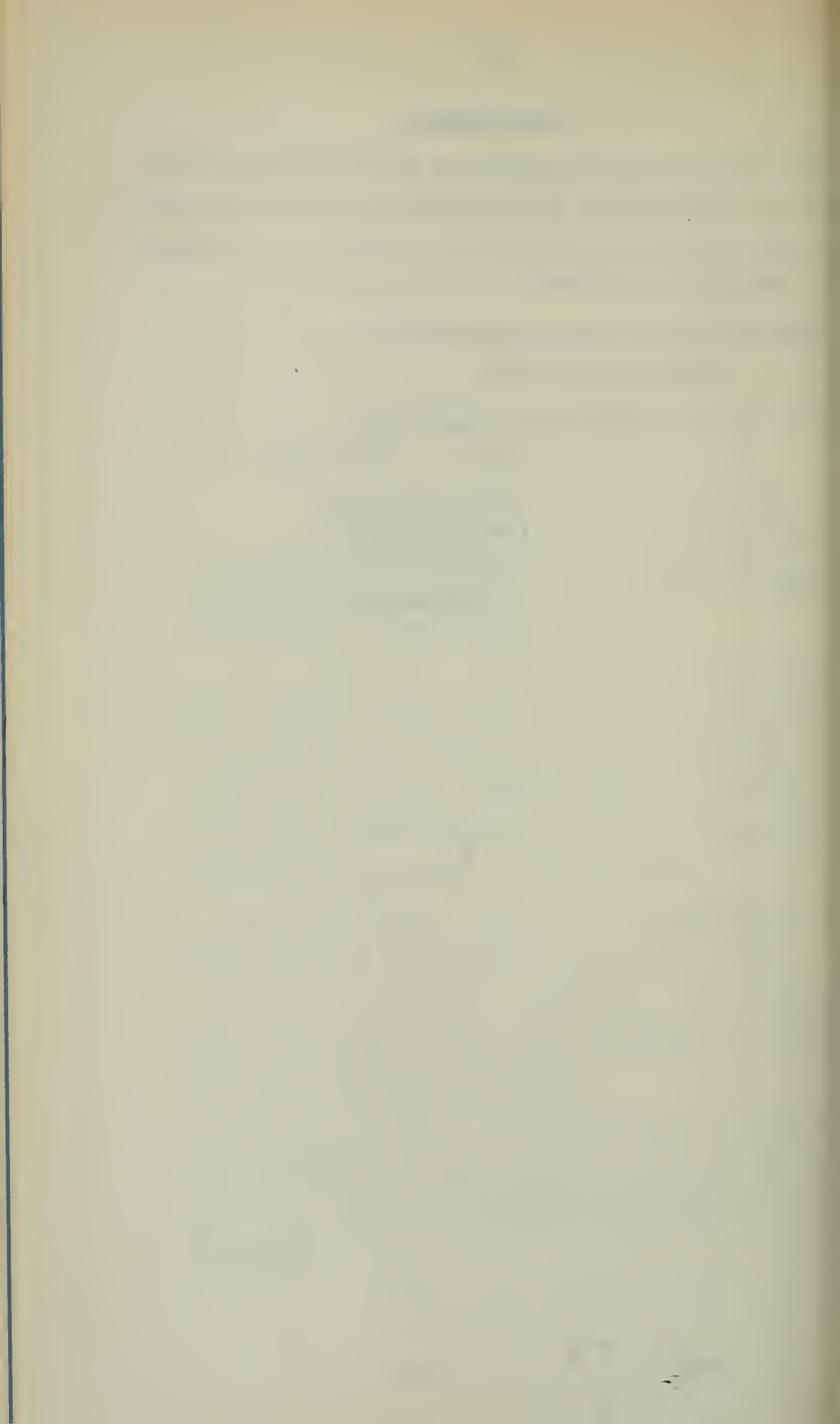
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No. 12,128

IN THE

United States Court of Appeals
For the Ninth Circuit

ALBERT ADELMAN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

MAR 14 1949

PAUL R. O'DRIEN,

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No. 12,128

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALBERT ADELMAN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

INTRODUCTORY COMMENT.

Appellant's contention is not correctly stated by either the Court below in its opinion (T. 13 and 14) or by appellee in its brief (p. 4).

Appellant simply contends:

1. That there is no tax on smoking opium imported into the United States, and as a corollary thereto,
2. That there is no "original stamped package" for such smoking opium.

These contentions of appellant were clearly set forth in his opening brief and will again hereinafter be sustained in appellant's comments on the contentions of appellee.

CONTENTIONS OF APPELLEE.

The contentions of appellee will be separately numbered and stated with page references to its brief and appellant's comment will follow each such contention.

I.

CONGRESS MAY TAX WHAT IT PROHIBITS—PAGE 2 WITH CASES CITED.

However, the government cannot charge that the defendant "did sell, dispense and distribute in or from the original stamped package a lot of smoking opium," when there could never be an "original stamped package", and the government is thereby bound by its own allegation.

II.

REPEALS BY IMPLICATION ARE NOT FAVORED—PAGE 4 WITH CASES CITED.

In making this argument, appellee assumes that the Harrison Narcotic Act does tax smoking opium. We seriously oppose the position that the Harrison Narcotic Act does tax smoking opium. It does not so state. As we stated in our opening brief, it only taxes items which are allowed to be admitted in conformity with the regulations in relation thereto.

However, while it is true that repeals by implication are not favored, according to the authorities, a

stated in *U. S. v. One Oakland Touring Automobile*, 9 Fed. (2d) 635, at p. 636:

“Plaintiff also counts upon section 3450 Rev. St. (Comp. St. § 6352). This statute relates to internal revenue taxes alone, and there are none on imported cocaine. Those imposed by the Harrison Anti-Narcotics Act (Comp. St. § 6287g) were repealed by the implication of the subsequent Drug Act prohibiting importation,”

and further stating,

“That statutes sanctioning activities and incidentally taxing them is irreconcilable with and is repealed throughout, incidentals as well as principal, by a subsequent statute prohibiting such activities and without any saving clause to perpetuate taxes. Of this rule of construction, also, the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{4}$ et seq.) is an illustration.”

There is also a further point in this: The Harrison Narcotic Act was passed in 1914, while the Jones-Miller Act was still in effect; therefore, it was not intended to including smoking opium in its scope, since that drug was already prohibited by the Jones-Miller Act and was not specifically mentioned in the Harrison Narcotic Act as being taxable—and, of course, the further point that if the Harrison Narcotic Act was intended to include smoking opium in the mentioning of the term “derivatives of opium” that inclusion was impliedly repealed by the subsequent re-enactment of the Jones-Miller Act in 1922 and in 1924, and the reasoning of Judge Bourquin in *U. S. v. One*

Oakland Touring Automobile, supra, is sound and applicable.

III.

THE HARRISON NARCOTIC ACT OF 1914 WAS HELD NOT TO AFFECT THE JONES-MILLER ACT—PAGE 6.

This statement and the case of *Gee Woe v. United States*, 250 Fed. 428, is favorable to our position under the alternative theory mentioned above; in other words, smoking opium, being absolutely prohibited by the Jones-Miller Act, that Act was in no way affected by the later passed Harrison Narcotic Act, and tends to show that smoking opium, prohibited by the Jones-Miller Act, was not intended to be taxed by the Harrison Narcotic Act.

IV.

MARKS v. UNITED STATES (C.C.A. 2, 1912), 196 FED. 476, HELD THAT THE 1909 ACT PROHIBITING THE IMPORTATION OF OPIUM FOR OTHER THAN MEDICINAL PURPOSES DID NOT REPEAL THE INTERNAL REVENUE ACT OF OCTOBER 1 1890, TAXING AND REGULATING THE MANUFACTURE OF SMOKING OPIUM.

This case is not in point at all. Here we are concerned with importing smoking opium and not manufacturing it as in the case cited by appellee.

V.

BOTH THE JONES-MILLER ACT AND THE HARRISON NARCOTIC ACT WERE AMENDED AND NO PROVISIONS IN REGARD TO SMOKING OPIUM IN THE JONES-MILLER ACT, OR DERIVATIVES OF OPIUM IN THE HARRISON NARCOTIC ACT WERE CHANGED, BUT WERE LEFT INTACT—PAGE 7.

This also proves nothing.

The fact that the Harrison Narcotic Act was reenacted with said provisions intact only shows that such provisions were in regard to opium derivatives of medicinal value, which were made legal to import under the regulations, and which were not prohibited, whereas, as stated in *Copperthwaite v. United States*, 37 Fed. (2d) at p. 848,

“The argument for distinction is that the importation of smoking opium was unconditionally forbidden, and hence that its importation must have been unlawful and every possessor must know it,”

and, as we strenuously contend, there could be no ‘original stamped package’ and thus there could be no tax assessed, for no one had a right to possess it in any manner.

 VI.

THE TARIFF ACTS OF 1922 AND 1930 DID NOT REPEAL OR AFFECT THE NARCOTIC DRUG IMPORT-EXPORT ACT—PAGE 7.

Again this proves nothing and the logic of appellant’s comment under V above is equally applicable.

VII.

APPELLEE'S COMMENT ON THE OPINION OF THE ATTORNEY
GENERAL, 27 AP. ATTY. GEN. 445—pp. 7 AND 8.

This attempt by the government to distinguish the opinion of the Attorney General does not destroy the logic and reasoning contained therein, and the opinion is still very forceful and applicable to the case involved. It states clearly the rule—that a taxing act on derivatives of opium is not intended to cover a drug that is to be summarily forfeited and thus reaffirming the opinion hereinabove quoted by Judge Bourquin in 9 Fed. (2d) at p. 636 and the 6th C.C.A. in *Copperthwaite v. United States*, supra, at page 848.

VIII.

APPELLEE'S COMMENT ON 26 U.S.C. 2567—pp. 8 AND 9.

Appellee's reasoning here is not in point. The fact that there is a tax on the manufacture of smoking opium is in no way inconsistent with the position that there is no tax on the importation of smoking opium. Title 26, Sec. 2567, provides for a tax on manufactured smoking opium. This relates to opium manufactured in the United States and in no way applies to opium manufactured outside of the country and brought in. It has no application to the charges in the instant case which relate to the sale of imported opium.

IX.

APPELLEE'S COMMENTS ON NG SING v. UNITED STATES
(C.C.A. 9), 8 F. (2d) 919 AND CHIN GUM v. UNITED STATES
(C.C.A. 1), 149 F. (2d) 575—pp. 10 AND 11.

There was no holding in either of the two above cited cases involving the points involved in the present case. The indictment in the *Chin Gum* case was brought under 26 U.S.C. 2554 (not having received a written order) rather than under 26 U.S.C. 2553(a) (not in original stamped package) and the holding in that case is, therefore, not against appellant.

CONCLUSION.

In conclusion, the fact that many narcotic indictments contain similar counts as were present in the Adelman case is not any argument why the government's position should be sustained. The question the Court must decide, while presenting a novel point, is nevertheless a logical one, and has the force of precedent of comparable construction, as contended for by appellant, by the Attorney General, and by two learned Courts, as hereinabove stated. It is not a case wherein one can freely sell smoking opium imported into the United States and not be amenable to law, as the Jones-Miller Act provides substantial punishment in relation thereto. As stated in the opening brief of appellant, in the construction of a penal statute, all reasonable doubts concerning its meaning ought to operate in favor of the appellant.

The judgment of the Court below on Counts I and III should be vacated and set aside.

Dated, San Francisco, California,
March 14, 1949.

Respectfully submitted,

A. J. ZIRPOLI,

JOHN J. SULLIVAN,

Attorneys for Appellant.

No. 12131

United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

SYDNEY MARK TAPER, HARDING MANOR,
INC., WARDLOW HEIGHTS, INC., and
WARDLOW ANNEX, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAR 4 - 1949

PAUL P. O'BRIEN,

United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
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SYDNEY MARK TAPER, HARDING MANOR,
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Central Division

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

No. 8451-PH

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

SYDNEY MARK TAPER, HARDING MANOR,
INC., a corporation, DOE I, DOE II, and
DOE III,

Defendants.

COMPLAINT FOR PRELIMINARY AND
FINAL INJUNCTION AND FOR OTHER
RELIEF.

I.

Plaintiff, as Housing Expediter, Office of the
Housing Expediter, brings this action for an in-
junction and other appropriate relief pursuant to
Section 206 of the Housing and Rent Act of 1947
as amended, for the purpose of enjoining the de-
fendants from evicting from the hereinafter de-
scribed housing accommodations the hereinafter
described persons.

II.

Jurisdiction is conferred on this Court by Sec-
tion 206 of the Housing and Rent Act of 1947 as
amended.

III.

The defendant, Harding Manor, Inc., is a cor-
poration duly organized and existing under the
laws of the State of California. [2]

IV.

At all times hereinafter mentioned defendants were the landlords of the housing accommodations located at 2538 Gale Avenue, Long Beach, California.

V.

At all times hereinafter mentioned there was in effect in the Los Angeles Defense Rental Area a Controlled Housing Rent Regulation (12 F. R. 4331).

VI.

At all times hereinafter mentioned the housing accommodations hereinafter described were subject to said aforementioned Act and Regulation and particularly Section 209 of said Act.

VII.

That the defendants, Doe I, Doe II and Doe III, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff ask that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

VIII.

That the defendants are residents within the County of Los Angeles, State of California, have their principal place of business within said County, and are within the jurisdiction of this Court.

IX.

That on or about June 3, 1948, the defendants, as landlords, commenced proceedings to evict from the housing accommodations at 2538 Gale Avenue at Long Beach, California, one, Alvin L. Fite, a tenant thereof and other persons lawfully in occupancy thereof, by serving a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such. That the defendants commenced such proceedings and served such notice for the expressly avowed purpose of making [3] said housing accommodations vacant in order that the same might be sold to persons who would purchase such housing accommodations for use as their residences.

X.

That defendants are engaged in evicting tenants from other properties of which they are the landlords, individually and under the guise of corporate structure, by serving notices to quit similar to the notice described in Paragraph IX of this complaint and with the same express avowed purpose alleged in said Paragraph IX, of which four such instances are known to plaintiff.

XI.

That said acts hereinabove alleged are in violation of the provisions of the Housing and Rent Act of 1947 as amended, that unless defendants are

restrained from further acts in furtherance of their design set forth above, they will evict said tenants and said defendant Sydney Mark Taper and Wardlow Annex, Inc., and Wardlow Heights, Inc., of which he is president and a major stockholder, will proceed to evict numerous tenants in numerous housing accommodations under similar circumstances and for similar purposes as hereinabove set forth.

Wherefore, the plaintiff demands:

A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from:

1. Evicting said Alvin L. Fite and other persons now in occupancy at the premises at 2538 Gale Avenue, Long Beach, California, from said premises.

2. Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded. [4]

3. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other es-

sential services and utilities, or threatening to do any of the foregoing.

4. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

5. Violating the Housing and Rent Act of 1947, as amended, or superseded, by accepting, demanding, or receiving, in any form or manner, rents higher than the established maximum rent prescribed therein.

Dated: Los Angeles, California, this 20th day of July, 1948.

ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

RICHARD G. SOLOF,

By /s/ CASSEL JACOBS,

Attorneys for Plaintiff. [5]

State of California,

County of Los Angeles,

United States of America—ss.

Ruth Rauh, being first duly sworn, deposes and says:

That plaintiff is absent from the County of Los Angeles; that the undersigned is an employee of the United States Government, and during the time specified in the complaint, as hereinabove set forth, she was employed as a Compliance Negotiator for the Office of the Housing Expediter, as agency of the United States Government; that in the course of her duty as a Compliance Negotiator for the

Office of the Housing Expediter she made an investigation of and became familiar with the facts involved in the above-mentioned action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that she believes it to be true.

/s/ RUTH RAUH.

Subscribed and Sworn to before me this 19th day of July, 1948.

/s/ H. C. ZECH,

Notary Public, in and for said
County and States.

My Commission expires Oct. 26, 1951.

[Endorsed]: Filed July 20, 1948. [6]

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES H. BLAYLOCK

State of California,
County of Los Angeles—ss.

I, Charles H. Blaylock, having been first duly sworn, depose and say, as follows:

That I am Associate Area Rent Director for the Los Angeles Defense Rental Area, Office of the Housing Expediter, in charge of the operations of the Los Angeles Defense Rental Area Office at Long Beach, California. That I am familiar with the records of the Los Angeles Defense Rental Area Office relating to the housing accommodations located at the following addresses:

2538 Gale Avenue, Long Beach, California, and 3557 Fashion Avenue, Long Beach, California.

That said records of the Area Rent Office relating to said housing accommodations show that said housing accommodations are controlled housing accommodations and that they are subject to the provisions of the Rent Regulation [8] for Controlled Housing. Mr. Sydney Mark Taper and corporations with which he is associated are the landlords of numerous housing accommodations in the Long Beach Area.

Dated: July 15th, 1948.

/s/ CHARLES H. BLAYLOCK.

Subscribed and sworn to before me this 15th day of July, 1948.

/s/ CORA A. KIRCHNER,

Notary Public, in and for the
above County and State.

My Commission Expires Nov. 11, 1951. [9]

[Title of District Court and Cause.]

AFFIDAVIT OF RUTH RAUH

State of California,
County of Los Angeles—ss.

I, Ruth Rauh, having been first duly sworn, depose and say, as follows:

That I am an employee of the Los Angeles Defense Rental Area Office, Office of the Housing Expediter, and my duties relate to housing accommodations in the Long Beach, California, Area. That as such employee I interviewed Mr. Harold C.

Frerks, Attorney for Sydney Mark Taper, President of Wardlow Heights, Inc., Harding Manor, Inc., and Wardlow Annex, Inc. That Mr. Frerks, as attorney for Mr. Taper, signed the following statement which is on file in the records of the Los Angeles Defense Rental Area Office at Long Beach, California:

“I believe that the O.H.E. opinion as to this section relates to where a certain purchaser or sale is involved, and not as to where a landlord intends to get possession [10] so that he can redecorate or add a room to the place for any future sale to parties unknown, who will occupy the place for themselves and not for rental purposes. H. C. Frerks.”

That the above statement of Mr. Frerks was made in connection with a notice to quit, served by Harding Manor, Inc., on Alvin L. Fite, et al, respecting the premises at 2538 Gale Avenue, Long Beach, California, and concerning an eviction notice served by Wardlow Annex, Inc., by S. M. Taper, on Max Ravnitzky, et al, relating to the premises at 3733 Easy Avenue, Long Beach, California.

That the statement had reference to housing and to Memorandum No. 51 issued by B. W. Diggle, Deputy Housing Expediter, Rent Operations, and Robert A. Sauer, Assistant General Counsel, Regulations and Appeals Branch, Office of the Housing Expediter, Washington, D. C., which states, in part, as follows:

“To Secure Vacant Possession for Purposes of Sale.

“Section 209(a)(5) permits eviction where ‘the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market . . .’ Since this is only one of several grounds for eviction under the Act, it is clear that it was not intended that this section should broaden or defeat the purpose of limitations placed in the other grounds. It follows, therefore, that since Section 209(a)(3) provides for eviction where ‘the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser;’ Section 209(a)(5) may not be used in cases where sales are involved. That is to say, since a tenant may be evicted for occupancy by a purchaser under Section 209(a)(3), a landlord may not evict under Section 209(a)(5) for the purpose of obtaining vacant possession in order to sell. [11]

“Section 206(b) of the Act authorizes the Housing Expediter to seek injunction against violations of the eviction provisions and consequently, any violations of the eviction restriction referred to above may be referred to Litigation for appropriate action.”

Mr. Frerks further stated to me, at the time he signed the above statement on June 11, 1948, at the Long Beach Office of the Housing Expediter, 110 East Anaheim Street, Long Beach, California, that the above premises are to be repaired and generally

remodeled and eventually sold to prospective purchasers, that it is the intention to take the cases into court for the court's decision on eviction. I advised Mr. Frerks that the reason stated in the notice to quit would seem to be in violation of Section 209(a)(5) of the Housing and Rent Act of 1947 as amended, in that it does involve a sale of the housing accommodations.

It is my impression, as a result of my conversation with Mr. Frerks that his clients named above are about to commence eviction proceedings in numerous instances.

Dated: July 15th, 1948.

/s/ RUTH RAUH,

Subscribed and sworn to before me this 15th day of July, 1948.

/s/ CORA A. KIRCHNER,

Notary Public, in and for the
above County and State.

My Commission Expires Nov. 11, 1951. [12]

[Title of District Court and Cause.]

AFFIDAVIT OF ALVIN L. FITE

State of California,
County of Los Angeles—ss.

I, Alvin L. Fite, having been first duly sworn, depose and say, as follows:

That on or about June 3, 1948, Harding Manor, Inc., by S. M. Taper, President, as landlord of the premises wherein I reside at 2538 Gale Avenue,

Long Beach, California, served me with a written notice to quit said premises at the expiration of sixty days of the notice.

Dated: July 3, 1948.

/s/ ALVIN L. FITE.

Subscribed and sworn to before me this 3rd day of July, 1948.

/s/ N. H. STEARNS,

Notary Public, in and for
above County and State.

My Commission expires Feb. 24, 1951.

[Endorsed]: Filed July 20, 1948. [13]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified complaint, memorandum of points and authorities and affidavits filed by plaintiff, and good cause appearing therefor:

It Is Hereby Ordered that defendants Sydney Mark Taper and Harding Manor, Inc., appear before this Court in Courtroom number 3 on the second floor of the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 26th day of July, 1948, at 10:00 o'clock a.m. in the forenoon, or as soon thereafter as the matter can be heard, and show cause, if any there be, why this Court, pending trial of this action, should not grant a preliminary injunction restraining the defendants, their agents, servants and employees and all persons in active concert or participation with them according to the prayer of the complaint.

It Is Further Ordered that a copy of the affidavits and points and [14] authorities filed by the plaintiff and a copy of this order be served with the summons and complaint herein upon defendants Sydney Mark Taper and Harding Manor, Inc., not later than the 22nd day of July, 1948.

Dated: Los Angeles, California, this 20th day of July, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed July 20, 1948. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff having filed his verified complaint and his affidavits and memorandum of points and authorities in support of his motion for preliminary injunction and the defendants, Sydney Mark Taper, and Harding Manor, Inc., through its President, Sydney Mark Taper, each having been personally served with a copy of the verified complaint, a copy of the order to show cause, a copy of the memorandum of points and authorities and affidavits in support of plaintiff's motion for preliminary injunction on the 22nd day of July, 1948, and the cause having come on regularly for hearing on the 26th day of July, 1948, before the Honorable Pierson M. Hall, Judge Presiding, and the plaintiff being represented by Frank L. Hirst, Esq., and said defendants not appearing in person or by counsel,

and said cause having been continued by order of the Court for hearing to the 27th day of July, 1948, at 10:00 o'clock a.m., at which time the cause was submitted on plaintiff's verified complaint, affidavits and memorandum of points and authorities in support of his motion [16] for preliminary injunction, no evidence having been offered in opposition to plaintiff's motion by said defendants, and no affidavits having been filed by them in opposition to said motion, and the Court having considered all of the allegations in said verified complaint and said affidavits, the said allegations being unopposed and the Court being fully apprized of the premises, makes the following findings of fact:

FINDINGS OF FACT

1. That the plaintiff as Housing Expediter, Office of the Housing Expediter, brings this action for an injunction and makes his motion for a preliminary injunction pursuant to Section 206 of the Housing and Rent Act of 1947 as amended, for the purpose of enjoining the defendants from evicting from the hereinafter described housing accommodations the hereinafter described persons.

2. That jurisdiction of this action is conferred on this Court by Section 206 of the Housing and Rent Act of 1947 as amended.

3. That the defendant Harding Manor, Inc., is a corporation, duly authorized and existing under the laws of the State of California.

4. That at all times hereinafter mentioned the defendants were the landlords of the housing ac-

accommodations located at 2538 Gale Avenue, Long Beach, California.

5. That at all times pertinent hereto there was in effect in the Los Angeles Defense Rental Area a Controlled Housing Rent Regulation (12 F.R. 4331).

6. That at all times pertinent hereto the housing accommodations hereinabove described were subject to said aforementioned Act of Regulation, particularly Section 209 of said Act.

7. That the defendants Sydney Mark Taper and Harding Manor, Inc., are residents within the County of Los Angeles, State of California, having their principal place of business within said county and are within the jurisdiction of this Court.

8. That on or about June 3, 1948, said defendants, as landlords, commenced proceedings to evict from the housing accommodations at 2538 Gale Avenue, Long Beach, California, one, Alvin L. Fite, a tenant thereof, and other persons [17] lawfully in occupancy thereof by serving upon the said Alvin L. Fite a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of said housing accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market and such housing accommodations are not thereafter to be offered for rent as such.

9. That said defendants commenced such proceedings and served such notice for the expressly avowed purpose of making said housing accommo-

dations vacant in order that the same might be redecorated and thereafter sold to persons who would purchase such housing accommodations for use as their residences.

10. That said defendants are engaged in evicting tenants from other housing accommodations subject to said Act and said Regulation of which they are the landlords individually and under the guise of corporate structure by serving notices to quit similar to the notice to quit hereinabove described and with the same expressly avowed purpose as hereinabove set forth.

11. That unless defendants are restrained from further acts in furtherance of their design set forth above they will evict said tenant and said Sydney Mark Taper and Harding Manor, Inc., of which said Sydney Mark Taper is President and a major stockholder, will proceed to evict numerous other tenants in numerous other controlled housing accommodations owned, controlled or managed by said defendants, under similar circumstances and for the same purpose as hereinabove set forth.

From the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. That the purpose for which said defendants Sydney Mark Taper and Harding Manor, Inc., have commenced said eviction proceedings and served said notices to quit on said Alvin L. Fite and said other tenants hereinabove referred to does not constitute a proper ground for eviction within the meaning of Section 209(a)(5) of said Housing and

Rent Act of 1947 as amended nor any other subdivision of said Section 209.

2. That the plaintiff herein is entitled to a preliminary injunction, pending the determination of the Court on plaintiff's complaint for a permanent [18] injunction, enjoining the defendants Sydney Mark Taper and Harding Manor, Inc., their agents, servants, employees, attorneys, officers and directors, and all other persons in active concert or participation with them from:

(a) Evicting Alvin L. Fite and all other persons in occupancy of the housing accommodations located at 2538 Gale Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947 as amended and on the grounds and for the purposes stated therein.

(b) Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

(c) Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

Dated: Los Angeles, California, this 27th day of July, 1948.

/s/ PIERSON M. HALL,
Judge.

Presented by:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

[Endorsed]: Filed July 27, 1948. [19]

In the District Court of the United States for the
Southern District of California, Central Division

No. 8451-PH

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

SYDNEY MARK TAPER, HARDING MANOR,
INC., a corporation, DOE I, DOE II, and
DOE III,

Defendants.

DECREE FOR PRELIMINARY INJUNCTION

This cause came on regularly for hearing on the motion of the plaintiff for a preliminary injunction on July 26, 1948, before the Honorable Pierson M.

Hall, Judge Presiding, and was continued for hearing to July 27, 1948, at 10:00 o'clock a.m. Plaintiff was represented by Frank L. Hirst, Esq., and defendants Sydney Mark Taper and Harding Manor, Inc., were not present and not represented by counsel. The Court having considered plaintiff's verified complaint and affidavits and memorandum of points and authorities in support of plaintiff's motion for a preliminary injunction, said defendants not having submitted either affidavits or other evidence, and the Court having this day made its written findings of fact and conclusions of law, and being fully advised in the premises, now therefore,

It Is Hereby Ordered, Adjudged and Decreed that the defendants Sydney Mark Taper and Harding Manor, Inc., their agents, servants, employees, attorneys, officers and directors and all other persons in active concert or [20] participation with them are hereby enjoined and restrained until further order of the Court herein from:

1. Evicting Alvin L. Fite and all other persons in occupancy of the housing accommodations located at 2538 Gale Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947 as amended and on the grounds and for the purposes stated therein.

2. Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or man-

aged by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

3. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

Dated: Los Angeles, California, this 27th day of July, 1948, 4:55 p.m.

/s/ PEIRSON M. HALL,
Judge.

Presented by:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

Judgment entered July 28, 1948. Docketed July 28, 1948. Book 52, Page 270.

[Endorsed]: Filed July 27, 1948. [21]

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 8451-PH

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

SYDNEY MARK TAPER, WARDLOW
HEIGHTS, INC., a corporation, WARDLOW
ANNEX, INC., a corporation, and HARDING
MANOR, INC., a corporation,

Defendants.

ANSWER

Comes Now the defendants, Sydney Mark Taper,
Harding Manor, Inc., a corporation, Wardlow An-
nex, Inc., a corporation, and Wardlow Heights,
Inc., a corporation, and answering the complaint
of the plaintiff on file herein admit, deny and al-
lege as follows:

I.

Answering Paragraph V, these defendants ad-
mit that at all times mentioned in the complaint
there was in effect the Housing and Rent Act of
1947, as amended by the Housing and Rent Act
of 1948, and admit that the property of the de-
fendants is in the Los Angeles Defense Rental
Area which is a controlled housing rent area, and
that there was in effect in the Los Angeles De-
fense Rental Area a controlled housing rent regu-
lation (12 F. R. 4331). [22]

II.

Answering Paragraph IX, these defendants admit that on or about, to-wit, the third day of June, 1948, the defendant, Harding Manor, Inc., a corporation, as landlord, commenced proceedings to evict from the housing accommodations at 2538 Gale Avenue, Long Beach, California, Alvin L. Fite, a tenant thereof, and that there was served upon said Alvin L. Fite a notice to quit, which said notice set forth that the landlord desired in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and that such housing accommodations would not thereafter be offered for rent as such. Admits that the defendant commenced the proceedings and served the notice and admits that the purpose of such notice was for the purpose of evicting the said Alvin L. Fite, but denies that there was any bad faith or other ulterior motives on the part of the said landlord and defendant Harding Manor, Inc.; denies each and every other allegation in said paragraph contained.

III.

Answering Paragraphs X and XI, these defendants deny that said acts hereinbefore referred to and as set forth in the plaintiff's complaint are in violation of the provisions of the Housing and Rent Act of 1947, as amended; on the contrary, allege that said acts are within the provisions of the regulations; deny each and every other allegation in said paragraph contained.

For a First Separate and Affirmative Defense,
These Defendants Set Forth:

I.

That the defendants are the owners of the real property described in the plaintiff's complaint and that [23] said properties have been leased to the persons mentioned in said complaint since the early part of 1945; that the property at 2538 Gale Avenue was leased to Alvin L. Fite on or about the 15th day of January, 1945, at a rental of Fifty Dollars (\$50.00) per month, which at that time was in accordance with the O.P.A. ceiling price fixed for said property.

II.

That at the time said premises were leased to Alvin L. Fite, the said Alvin L. Fite agreed to maintain said property in good order, to keep the lawns watered and to keep the premises in a clean and healthy condition.

III.

Defendants allege that the property occupied by said Alvin L. Fite was so maintained by the said Alvin L. Fite so as to be dirty, filthy and in a complete state of disrepair; that the said Alvin L. Fite permitted windows to be broken, hardwood floors to be marred and scratched with the floors being worn; that the linoleum was torn from the floor; that the window shades were broken and torn; that the premises were so misused so as to have marks on all the plaster walls; that the windows were jarred loose from the frames; that the toilet seat was broken; that the woodwork was scratched; that the

lawns were unwatered and dry to the point of needing replacement; that said Alvin L. Fite permitted the back yard to be littered with debris so as to need a complete replanting; that the screens were broken and torn; that the tile was chipped and broken; that said property was so badly abused as to cause the same to depreciate in value and become unmerchantable and unsalable. [24]

IV.

That in addition thereto, the said house was leased to the said Fite in January of 1945 at a rental of Fifty Dollars (\$50.00) per month and that since said date the cost of maintaining said property has increased as to cause the defendants to sustain a loss as a result of its rental at said figure. That the said house has a value of approximately Nine Thousand Dollars (\$9,000.00) and that the following costs and expenditures are necessary in connection with the operation of said property, to-wit:

Taxes: \$110.00 per year.

Interest to the Bank of America under FHA Insured loan, including $\frac{1}{2}\%$ FHA insurance: \$215.00 per year.

Fire insurance: \$12.00 per year.

Depreciation at 4% per year: \$294.00 per year.

Repairs consisting of redecorating or repairing the outside (on a basis of once every three years) at an average cost of \$86.00 or a cost of \$28.66 per year.

Replacement of screens at a cost of \$11.00 per year.

Repairs to plumbing, windows and miscellaneous repairs on an average of \$13.00 per year.

Total cost of maintenance of said property: \$708.00 per year, or a net cost of approximately Fifty-nine Dollars (\$59.00) per month, exclusive of any return to the defendants on their investment and exclusive of any major repairs such as the replacement of the roof, replacement of lawns, replacement of worn-out plumbing or tile, replacement of water heaters, replacement of heating system or other usual and customary replacements which have to be [25] made over a period of years, exclusive of interior decorating.

V.

Defendants further set forth that the payments which the said Alvin L. Fite was making to the defendants were in the sum of Fifty Dollars (\$50.00) per month or Six Hundred Dollars (\$600.00) per year and that the defendants were sustaining a loss of Nine Dollars (\$9.00) per month or One Hundred Eight Dollars (\$108.00) per year without taking into account any consideration for a return on the capital investment of the defendants, without allowance for the collection of rents, without allowance for the office overhead and supervisory duties of the defendants and their employees, without allowances for accounting fees and the various and sundry other charges usually entailed in the handling and rental of property.

VI.

Defendants further set forth that upon it appearing that the defendants were sustaining a loss as set forth in the preceding paragraphs, they made application with the Office of Housing Expediter, Ben C. Koepke, and that after expending several hundred dollars for obtaining the necessary information including the time of the agents and representatives of the defendants in gathering information requested by the Housing Expediter, the Housing Expediter allowed a rent increase of One and twenty-five/one-hundredths Dollars (\$1.25) per month or a total of Fifteen Dollars (\$15.00) per year, so that notwithstanding the increase in rent of One and twenty-five/one-hundredths Dollars (\$1.25) per month, the defendants were still sustaining a loss of Ninety-three Dollars (\$93.00) per year and this without allowing anything to the defendants for office overhead, collections of rents, or any return on the investment of the defendants, nor for the replacement costs of damages to the property if the same was maintained for any period of time; that notwithstanding such increase, [26] defendants were sustaining a loss of Two Hundred Twenty-five Dollars (\$225.00) per year on said house.

VII.

That thereupon, the defendants elected to remove said property from the housing market and to have said property placed in such condition at an expenditure of several hundred dollars so as to be in

a position to sell said property, and that the only purpose of reaching the conclusion to sell said property was by reason of the fact that the defendants could not obtain the necessary relief which would prevent them from taking the losses which they were sustaining from the rental of said property.

VIII.

That if said properties were not disposed of at the present time, not only would the defendants be taking a loss on their property during this time it was occupied, but that the market value of said property which is now fixed at the sum of approximately Nine Thousand Dollars (\$9,000.00) may in the future drop and that in such event, the defendants would not be able to dispose of the property at its present value; that likewise at a later date, the property may depreciate so that even at a rental of Fifty Dollars (\$50.00) per month they would then sustain great losses, whereas if the defendants were now permitted to dispose of said property they could do so without a loss and recover their investment.

For a second separate and affirmative defense, these defendants allege:

I.

Defendants adopt and reallege all of their allegations of the First Affirmative Defense and make the same a part hereof, as though the same were fully set forth at length herein.

II.

That under the Housing Act as hereinbefore referred to, [27] the defendants had the right to remove said property from the rental market and that in that connection they set forth that Title II of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, Section 209A, Subdivision 5, provides that: "The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing the housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such."

III.

Defendants set forth that they do intend to recover the possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and the defendants represent that the said housing accommodations will not be offered for rent as such and that the defendants will not rent said housing accommodations but will remove them from the rental market; that the defendants have the right to remove said housing accommodations from the rental market and have a right to evict any tenant occupying said premises for such purposes.

Wherefore, defendants pray that they have judgment and that the preliminary injunction heretofore issued to be dissolved and that the action as to the property concerning Alvin L. Fite be dismissed; that the court decree that the defendants have the

right to evict tenants in possession for the purpose of removing said housing accommodations from the rental market upon condition that the defendants do not offer said property for rent.

ALBERT H. ALLEN &
HYMAN GOLDMAN

By /s/ ALBERT H. ALLEN,
Attorneys for Defendants.

(Acknowledgment of service attached.)

[Endorsed]: Filed August 10, 1948. [28]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS
PURSUANT TO RULE 36

Plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requests the defendant Harding Manor, Inc., within ten days after the service of this Request, to make the following admissions for the purpose of this action only and subject to all pertinent objection to admissibility which may be interposed at the trial.

1. That Sydney Mark Taper is the President and owns one-half of the issued stock of Harding Manor, Inc.

2. That Sydney Mark Taper is the President and owns one half of the issued stock of Wardlow Annex, Inc.

3. That Sydney Mark Taper is the President and owns one half of the issued stock of Wardlow Heights, Inc.

4. That as President of Harding Manor, Inc. Sydney Mark Taper managed the proceeding to evict Alvin L. Fite from 2538 Gale Avenue, Long Beach, California, and also the proceedings to evict tenants described in the complaints in [30] Woods v. Taper, United States District Court, Southern District of California, No. 8452 and Woods v. Taper, United States District Court, Southern District of California, No. 8453.

5. That Sydney Mark Taper, as President of Harding Manor, Inc., retained H. C. Frerks as an attorney to evict said Alvin L. Fite and to handle the evictions described in the complaints in said case Numbers 8452 and 8453.

6. That all three of said corporations and Sydney Mark Taper taken together are the landlords of numerous residential housing accommodations in Los Angeles County occupied on the date of filing this suit by tenants.

7. That Wardlow Heights, Inc., as landlord, and Sydney Mark Taper, as President thereof, have commenced efforts to evict Lucy A. Heustis from 3500 Easy Avenue, Long Beach, Paul R. Moberly from 3533 Fashion Avenue, Long Beach, and Henry Monkiewicz from 3557 Fashion Avenue, Long Beach, by serving each of said tenants with a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such.

8. That the said Wardlow Heights Inc. and Sydney Mark Taper commenced such efforts to evict tenants described in Item 7 of this Request for the purpose of making such housing accommodations described in Item 7 of this request vacant in order that the same might be redecorated and thereafter sold to persons who would purchase such housing accommodations for use as their residences.

9. That Wardlow Annex, Inc. and Sydney Mark Taper, as President thereof, have commenced efforts to evict Max Ravnitzky from 3733 Easy Avenue, Long Beach, by serving him with a notice to quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such.

10. That said Wardlow Annex Inc. and Sydney Mark Taper commenced such efforts to evict described in Item 9 of this Request for the purpose of [31] making said housing accommodations described in Item 9 of this Request vacant in order that the same might be redecorated and thereafter sold to persons who would purchase such housing accommodations for use as their residences.

11. That all of the issued stock of each Harding Manor, Inc., Wardlow Heights, Inc. and Wardlow Annex, Inc. are owned by the same persons.

12. That Sydney Mark Taper and his wife own all the issued stock of said three corporations.

13. That on or about June 11, 1948 H. C. Frerks executed the following written statement at

the Long Beach Office of the Housing Expediter: "I believe that the Office of Housing Expediter's opinion as to this section relates to where a certain purchaser or sale is involved, and not as to where a landlord intends to get possession so that he can redecorate or add a room to the place for any future sale to parties unknown, who will occupy the place for themselves and not for rental purposes."

14. That in executing said statement H. C. Frerks was acting as a representative of the defendant Harding Manor Inc.

15. That concurrently with the execution of said statement said H. C. Frerks advised one, Ruth Rauh, an employee of the Office of the Housing Expediter at Long Beach, that the housing accommodations at 3733 Easy Avenue and 2538 Gale Avenue, both addresses at Long Beach, are to be repaired and generally renovated and the premises eventually sold to prospective purchasers, that it is the intention to take the cases into Court for the Court's decision on eviction.

16. That during the conversation set forth in part in Item 15 of this Request said Ruth Rauh advised said H. C. Frerks that the reason stated in the notice to quit served on Alvin L. Fite and Wanda W. Fite on or about June 3, 1948 would seem to be in violation of Section 209(a)(5) in that it does involve a sale of the housing accommodations.

17. That H. C. Frerks stated to employees of the Office of the Housing Expediter at Long Beach

that defendant Sydney Mark Taper has several hundred homes in the area in and about the City of Long Beach rented to various tenants and that it is expected that defendant Sydney Mark Taper will use the same ground for eviction as used in the case of tenants Alvin L. Fite and [32] Max Ravnitzky, namely, for the purposes of redecorating and then effecting a sale.

18. That H. C. Frerks told employees of the Office of the Housing Expediter at Long Beach that defendant Sydney Mark Taper has constructed approximately 1,000 homes in the area in and about Long Beach since the commencement of World War II and is one of the big operators in said area.

19. That employees of the Long Beach Office of the Office of the Housing Expediter advised H. C. Frerks that said eviction procedure referred to in Item 10 of this Request is improper and an attempt to circumvent and evade the Rent Regulation and would be resisted by the Office of the Housing Expediter.

20. That one, H. C. Frerks, acting as an attorney at law for defendants, told Mrs. Wanda W. Fite on or about June 3, 1948 that defendants were evicting 85 tenants because Biltmore Homes were not allowed a rent increase.

21. That in the latter part of May, 1948 a representative of defendant Sydney Mark Taper told said Mrs. Fite that the housing accommodations at 2538 Gale Avenue, Long Beach, would be offered for sale.

22. Said Inspector at said time asked Mrs. Fite whether she was going to buy said housing accommodations.

23. Mrs. Fite replied to said question that she was not going to buy said housing accommodations.

Dated: Los Angeles, California, this 16th day of August, 1948.

ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

RICHARD G. SOLOF,

By: /s/ BENJAMIN CHAPMAN,

Rent Litigation,

Attorneys for Plaintiff.

(Affidavit of Service by mail attached.)

[Endorsed]: Filed August 16, 1948. [33]

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

Come now the defendant Sydney Mark Taper and the defendant Harding Manor, Inc., a corporation and, in response to plaintiff's request for admissions, pursuant to Rule 36 of the Federal Rules of Civil Procedure, makes the following admissions: That the said admissions are herein numbered to correspond to the numbers of the requested admissions.

1. That Sydney Mark Taper is the president of Harding Manor, Inc. and owns one-half ($\frac{1}{2}$) of the issued stock of said corporation.

2. That Sydney Mark Taper is the president of Wardlow Annex, Inc. and owns one-half ($\frac{1}{2}$) of the issued stock of said corporation.

3. That Sydney Mark Taper is the president of Wardlow [35] Heights, Inc. and owns one-half ($\frac{1}{2}$) of the issued stock of said corporation.

4. That as president of Harding Manor, Inc., Sydney Mark Taper engaged H. C. Frerks to prepare for Harding Manor, Inc. a Notice to Vacate, addressed to Alvin L. Fite, 2538 Gale Avenue, Long Beach, California, a copy of which said notice is attached hereto, marked Exhibit "A" and admitted to be a true and correct copy of the notice served upon said Alvin L. Fite. That the said Sydney Mark Taper, individually or as president of Harding Manor, Inc., did not manage the proceedings to evict said Alvin L. Fite from the premises at 2538 Gale Avenue, Long Beach, California, and had no knowledge or information concerning any action brought by Tighe E. Woods, Housing Expediter of the Office of the Housing Expediter, in the United States District Court, Southern District of California, nor did said Sydney Mark Taper, individually or as president of Harding Manor, Inc. have any knowledge of the proceedings until after the matter had been heard in the District Court and newspaper publicity given to said proceedings.

5. That Sydney Mark Taper, as president of Harding Manor, Inc., retained H. C. Frerks, an

attorney at law, solely for the purpose of preparing the Notice to Quit mentioned in the preceding admission, a copy of which is attached hereto as Exhibit A. That the said Sydney Mark Taper did not engage the said H. C. Frerks for any other purpose whatsoever, nor was the said H. C. Frerks engaged to handle any evictions or any other matters other than the preparation of said Notice to Quit.

6. That Sydney Mark Taper is a shareholder of the three corporations mentioned in the various complaints, but has no individual interest in the property other than as a shareholder. That the said corporations are the landlords of numerous residential housing accommodations in Los Angeles County and were such landlords as of the date of filing of the various actions by the [36] said Woods against said Taper and said corporations. That said corporations did cause to be served upon various tenants notices to quit.

7. That Wardlow Heights, Inc. did commence efforts to evict Lucy A. Heustis from the property at 3500 Easy Avenue, Long Beach, California, Paul R. Moberly from the property at 3533 Fashion Avenue, Long Beach, California and Henry Monkiewicz from the property at 3557 Fashion Avenue, Long Beach, California, by serving upon said tenants a notice to quit and that said notices were based on the landlord's desire in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market and that the landlord did not propose after the

eviction of said tenants to offer said property for rent.

8. Objects to answering the request for admission 8 on the grounds that it is irrelevant, immaterial and not within the purview of the action.

9. That Wardlow Annex, Inc. did commence efforts to evict Max Ravnitzky from the property at 3733 Easy Avenue, Long Beach, California, by serving upon said tenant a notice to quit and that said notice was based on the landlord's desire in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market, and that the landlord did not propose after the eviction of said tenant to offer said property for rent.

10. Objects to answering the request for admission 10 on the grounds that it is irrelevant, immaterial and not within the purview of the action.

11. That all of the stock of Harding Manor, Inc., Wardlow Heights, Inc. and Wardlow Annex, Inc. is owned by the same persons.

12. That Sydney Mark Taper and Amelia Taper own all of [37] the issued stock of said three corporations.

13. That Sydney Mark Taper, individually and as president of the three corporations mentioned in request for admission 11, and that Harding Manor, Inc. have no knowledge, information or belief concerning the alleged statement in request for

admission 13, and basing such answer to said admission because of such lack of information, deny that said statement was made. Set forth that if such statement were made, it was made by said H. C. Frerks without the knowledge of consent of Sydney Mark Taper or Harding Manor, Inc.

14. That Sydney Mark Taper and Harding Manor, Inc. have no knowledge of any statements made by said H. C. Frerks, but that if such statements were made, the said H. C. Frerks had no authority to make such statements, and that said H. C. Frerks was not an agent or representative of the defendant, Harding Manor, Inc. That the said H. C. Frerks was engaged solely for the purpose of preparing the notice to quit hereinabove mentioned, and a copy of which is attached hereto as Exhibit A.

15. That Sydney Mark Taper and Harding Manor, Inc. have no knowledge, information or belief concerning any conversation between the said H. C. Frerks and Ruth Rauh, an employee of the Office of Housing Expediter, and set forth that if such statements were made, they were not made as the agents or representatives of the defendants and were made without the knowledge or consent of the defendants, and that the said H. C. Frerks was engaged solely for the purpose of preparing the notice to quit, a copy of which is attached thereto as Exhibit A.

16. That the defendant Sydney Mark Taper and Harding Manor, Inc. have no knowledge, informa-

tion or belief concerning any statements by H. C. Frerks or Ruth Rauh, and that if any such statements were made, they were not made to or by the said H. C. [38] Frerks as an agent, representative or attorney for the defendants and they were made to or by the said H. C. Frerks without any authority to represent the defendants in that respect.

17. That Sydney Mark Taper and Harding Manor, Inc. had no knowledge or information concerning any statements made by H. C. Frerks to employees of the Office of Housing Expediter at Long Beach, and that if any such statements were made, they were made without the authority of Sydney Mark Taper or Harding Manor, Inc. and were not made as agents for said defendants. That it is not true that Sydney Mark Taper has several hundred homes in the area in and about the City of Long Beach rented to various tenants and that it is not true that Sydney Mark Taper will use the same grounds as are used for the eviction of the tenants Alvin L. Fite and Max Ravnitzky against other tenants, and denies that such evictions were for the purpose of redecorating. Denies that the purpose of evicting any tenants was for the purpose of redecorating and then offering said property for sale. Admits that the purpose of evicting the tenants was to remove the property from the rental market.

18. Objects to answering the request for admission 18 on the grounds that the same is irrelevant, immaterial and not within the issues of this litigation.

19. That Sydney Mark Taper and Harding Manor, Inc. have no knowledge, information or belief concerning any statements made by any of the employees of the Long Beach office of the Office of Housing Expediter and have no knowledge, information or belief concerning any advice that may have been given by the Office of the Housing Expediter and allege that said H. C. Frerks had no authority to act for the defendants nor to make any statements or admissions for the defendants. That the said H. C. Frerks was engaged solely for the purpose of preparing the notice to quit, a copy of which is attached hereto, marked Exhibit A.

20. That Sydney Mark Taper and Harding Manor, Inc. have no knowledge, information or belief concerning any statements made by H. C. Frerks to Wanda W. Fite on or about June 3, 1948 or any other persons, and that if any such statements were made, they were not made with the knowledge or consent of the defendants, and that the said H. C. Frerks was not the agent of said defendants and had no authority to make such statements.

21. That Sydney Mark Taper and Harding Manor, Inc. have no knowledge, information or belief concerning any statements made by H. C. Frerks to Wanda W. Fite in or about the latter part of May, 1948 or any other persons, and that if any such statements were made, they were not made with the knowledge or consent of the defendants, and that the said H. C. Frerks was not the

agent of said defendants and had no authority to make such statements.

22. That these defendants have no knowledge, information or belief concerning any statements made by the inspector or Mr. Fite and that said statements were not binding on the defendants and have no bearing or issue on the matters herein contained.

23. That these defendants have no knowledge, information or belief concerning any statements made by Mrs. Fite concerning the purchasing of said housing accommodation.

Dated at Los Angeles, California this 19th day of August, 1948.

ALBERT H. ALLEN &
HYMAN GOLDMAN,

By,
Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

Sydney Mark Taper, being first duly sworn, on oath deposes and says: that he is the president of Harding Manor, Inc., a corporation, and that he is one of the defendants in the above- [40] entitled action. Affiant further states that he has had served upon him through his counsel, Albert H. Allen and Hyman Goldman, a request for admissions, pursuant to Rule 36, and that he makes said admissions and said denials and that the same are true

of his own knowledge and belief, except as to such matters therein set forth on information and belief and as to those matters he verily believes them to be true.

/s/ SYDNEY MARK TAPER.

Subscribed and sworn to before me this 21st day of August, 1948.

(Seal) /s/ HUGH A. SCHUEBEL,
Notary Public in and for said County and State.

My Commission Expires Nov. 23, 1951.

[Endorsed]: Filed Aug. 24, 1948. [41]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Plaintiffs above-named and Abe I. Levy,
Stephen D. Monohan, Frank L. Hirst and Richard G. Solof, his attorneys:

You and Each of You Will Please Take Notice that on Monday, the 13th day of September, 1948, at 10:00 o'clock a.m. of said day, or as soon thereafter as counsel may be heard, in Court Room 3 of the above-entitled Court, at the Court House of the City of Los Angeles; County of Los Angeles, State of California, the above-named defendants will move the Court to strike out the complaint of the above-named plaintiff and to enter judgment in favor of the defendants on the grounds that the plaintiff's complaint sets forth no cause of action.

Said motion will be made and based upon this notice, the affidavit of Sydney Mark Taper served

herewith, the complaint, the answer, and the records and files in this section.

Dated this 30th day of August, 1948.

ALBERT H. ALLEN &

HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,

Attorneys for Defendants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Sept. 1, 1948. [42]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now Come the defendants in the above-entitled action and move the Court for an order to strike out the complaint of the plaintiff and for Summary Judgment herein on the grounds that the complaint sets forth no cause of action. This motion is made and based upon the Notice of Motion served concurrently with this Motion and upon the pleadings, papers, records and files in this action, and upon the affidavit of Sydney Mark Taper.

Dated this 30th day of August, 1948.

ALBERT H. ALLEN &

HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,

Attorneys for Defendants.

[Endorsed]: Filed Sept. 1, 1948. [44]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Sydney Mark Taper, being first duly sworn, on oath, deposes and says:

That he is one of the defendants in the above-entitled action and that he is the president of Harding Manor, Inc., one of the defendants in the above-entitled action;

Affiant further sets forth that as president of Harding Manor, Inc., a corporation, and that as a director and shareholder of said corporation he caused to be served upon Alvin L. Fite, tenant of defendant, Harding Manor, Inc., a corporation, a notice to vacate the premises, a copy of which said notice is attached hereto, marked Exhibit A, and specifically made a part hereof.

That said Notice was served upon said Alvin L. Fite solely for the purpose of seeking possession of the said premises occupied [45] by the said Alvin L. Fite.

Affiant further sets forth that said Notice was served in accordance with the provisions of Section 209(a)(5) of the Housing and Rent Act of 1948, 50 U.S.C.A. Appendix, dated August, 1948, Section 1899, and that such notice was served and the possession of said premises were sought by Harding Manor, Inc., and this affiant for the purpose of

recovering possession of such housing accommodations; that Harding Manor, Inc., a corporation, and this affiant sought in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and that said corporation and said affiant did not thereafter nor do they hereafter propose to offer said housing accommodations for rent as such.

Affiant further sets forth that Harding Manor, Inc., a corporation, and this affiant will not hereafter offer such housing accommodations for rent as such and that said Harding Manor, Inc., a corporation, and this affiant, desire in good faith to remove said housing accommodations from the rental market and that said Harding Manor, Inc. and this affiant will not permit said housing accommodations to be rented as housing accommodations so long as any act of the United States of America, the State of California, the County of Los Angeles, or the City of Long Beach, where said housing accommodations are located, will have in effect any statute, law or ordinance which will limit the use to which the defendants can put their property or so long as any rental regulations will require the control of said housing accommodations.

Affiant further sets forth that subsequent to the service of the notice hereinbefore described and attached hereto as Exhibit A, the said Alvin L. Fite did, voluntarily, vacate said premises and the said Alvin L. Fite is no longer a tenant of the defendant, Harding Manor, Inc., or of this affiant.

Affiant sets forth that at the time of the service of the [46] Order to Show Cause in the above-entitled action, this affiant had just returned to Long Beach having been away from the office for more than two (2) weeks; that said papers were served on a Friday evening; that the hearing was set for Monday morning; that this affiant delivered said papers to one of his assistants, instructing him to look into the matter forthwith; that Harold Frerks, Attorney at Law, who had served the original notice to quit, was away from the City on a honeymoon and this affiant had no knowledge that said matter would not be defended and the first notice this affiant had that a hearing would be had on said matter was after the hearing had already been had and the newspapers published the account of the Court's ruling. Affiant states that if he were apprised of the fact that the matter would be heard on such short notice, he would have given the matter his attention, engaged counsel and would have defended the action. At the time the papers were served upon affiant, there was no opportunity to even engage counsel to defend the matter.

Affiant further states that if he were called upon as a witness to testify in this action, he would testify substantially as is set forth in this affidavit.

/s/ SYDNEY MARK TAPER.

Subscribed and Sworn to before me this 30th day of August, 1948.

(Seal) /s/ J. L. MILLS,

Notary Public in and for said County and State

EXHIBIT A

NOTICE TO QUIT

To Alvin L. Fite, Wanda W. Fite, and all others,
tenants in possession:

Take Notice that you are hereby required to quit and deliver up to the undersigned the possession of the premises now held and occupied by you, being the premises known as, 2538 Gale Avenue, Long Beach, California, at the expiration of the 60 days after this notice is served upon you, and in computing the said 60 days, the 60 day period will start from the following day after the day of service upon you of this notice as required by law.

This notice is given and served upon you in accordance with the law of California, and with the Housing and Rent Act of 1948, wherein it is provided that eviction is authorized in that the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such.

This is intended as a 60 day notice to quit, for the purpose of terminating your tenancy afore-said.

Dated June 3, 1948.

/s/ S. M. TAPER,

Lessor.

HAROLD C. FRERKS,

Attorney at Law.

Civil Code Section 3345, if any person or tenant holds over after written demand for possession, such person Must Pay Treble Rent during the time He Continues In Possession after such notice.

[Endorsed]: Filed Sept. 1, 1948. [48]

[Title of District Court and Cause.]

AFFIDAVIT OF MRS. ALVIN L. FITE

I, Mrs. Alvin L. Fite, having been first duly sworn, deposes and says, as follows:

I have read the following extractions sent to me by the Office of the Housing Expediter, taken by them from the answer filed by the defendants in Woods vs. Taper, U.S.D.C. No. 8451-PH.

“That at the time said premises were leased to Alvin L. Fite, the said Alvin L. Fite agreed to maintain said property in good order, to keep the lawns watered and to keep the premises in a clean and healthy condition.

“Defendants allege that the property occupied by said Alvin L. Fite was so maintained by the said Alvin L. Fite so as to be dirty, filthy and in a complete state of disrepair; that the said Alvin L. Fite permitted windows to be broken, hardwood floors to be marred and scratched with the floors being worn, that the [70] linoleum was torn from the floor; that the window shades were broken and torn; that the premises were so misused so as

to have marks on all the plaster walls; that the windows were jarred loose from the frames; that the toilet seat was broken; that the woodwork was scratched; that the lawns were unwatered and dry to the point of needing replacement; that said Alvin L. Fite permitted the back yard to be littered with the debris so as to need a complete replanting; that the screens were broken and torn; that the tile was chipped and broken; that said property was so badly abused as to cause the same to depreciate in value and become unmerchantable and unsalable."

The above statements taken from defendants' answer are untrue. We lived at 2538 Gale Avenue from March, 1944 to July 9, 1948. Harding Manor Inspectors came on our premises every six months for inspection. Each time the sheet was marked satisfactory care of the house. Our last inspection which occurred was one week before we were served our eviction notice on June 3, 1948. Mr. Schubel, the inspector told me (Mrs. Fite) that the house was in good condition, but the lawn needed mowing. When the attorney served me the notice he said, quote: "Mrs. Fite, Harding Manor, Inc., are evicting 85 tenants because O.P.A. would not let them raise the rent 10% and put the house up for sale."

The condition of the house was good when we vacated said premises July 9, 1948. There was no broken windows, the screens were in perfect condition. The tile was not broken, neither was the

toilet seat. There absolutely was no linoleum torn from the floor. All hardwood floors had been waxed and polished all the time we lived there. Some of the shades had been torn at the bottom and we repaired them. There had been no shade replacements in the four years and four months we lived there. The lawn was dry but Harding Manor did not have to replace it.

Harding Manor, Inc., did not do any inside decorating the full time we lived there. We told them we would do the painting if they would furnish the paint, but they would not. We bought paint and painted the kitchen [71] and bathroom.

/s/ MRS. ALVIN L. FITE.

Subscribed and Sworn to before me this 18th day of September, 1948.

(Seal) /s/ N. H. STEARNS,

Notary Public in and for the County of Los Angeles, State of California. My Commission expires Feb. 24, 1951.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 20, 1948. [72]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between counsel for the plaintiff and counsel for the defendants

that the following cases shall be consolidated in to case number 8451-PH and treated as one case:

1. Woods v. Sydney Mark Taper, Harding Manor, Inc, No. 8451-PH.

2. Woods v. Sydney Mark Taper, Wardlow Heights, Inc., No. 8452-PH.

3. Woods v. Sydney Mark Taper, Wardlow Annex, Inc., No. 8453-PH.

Dated Los Angeles, California, this 27th day of September, 1948.

ABE I. LEVY, STEPHEN D. MONAHAN,
FRANK L. HIRST, RICHARD G. SOLOF,
BENJAMIN CHAPMAN,

By /s/ BENJAMIN CHAPMAN,
Attorneys for Plaintiff.

By /s/ ALBERT H. ALLEN,
Attorney for Defendants in all three cases.

Good cause appearing therefor, it is so ordered.
This 27th day of September, 1948.

/s/ CHARLES C. CAVANACH,
Judge.

[Endorsed]: Filed Sept. 27, 1948. [77]

In the District Court of the United States
Southern District of California, Central Division

No. 8452-PH

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

SYDNEY MARK TAPER, WARDLOW
HEIGHTS, INC., a corporation, DOE I, DOE
II, and DOE III,

Defendants.

COMPLAINT FOR PRELIMINARY AND
FINAL INJUNCTION AND FOR OTHER
RELIEF

I.

Plaintiff, as Housing Expediter, Office of the
Housing Expediter, brings this action for an injunc-
tion and other appropriate relief pursuant to Sec-
tion 206 of the Housing and Rent Act of 1947
as amended, for the purpose of enjoining the
defendants from evicting from the hereinafter
described housing accommodations the hereinafter
described persons.

II.

Jurisdiction is conferred on this Court by Sec-
tion 206 of the Housing and Rent Act of 1947 as
amended.

III.

The defendant Wardlow Heights, Inc. is a cor-
poration duly organized and existing under the
laws of the State of California. [78]

IV.

At all times hereinafter mentioned defendants were the landlords of the housing accommodations located at 3500 Easy Avenue, Long Beach, California; at 3533 Fashion Avenue, Long Beach, California, and at 3557 Fashion Avenue, Long Beach, California.

V.

At all times hereinafter mentioned there was in effect in the Los Angeles Defense Rental Area a Controlled Housing Rent Regulation (12 F. R. 4331).

VI.

At all times hereinafter mentioned the housing accommodations hereinafter described were subject to said aforementioned Act and Regulation and particularly Section 209 of said Act.

VII.

That the defendants, Doe I, Doe II and Doe III, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

VIII.

That the defendants are residents within the County of Los Angeles, State of California, have their principal place of business within said County, and are within the jurisdiction of this Court.

IX.

That on or about June 3, 1948 the defendants, as landlords, commenced proceedings to evict from the housing accommodations at 3500 Easy Avenue, Long Beach, California, one, Lucy A. Heustis, a tenant thereof and other persons lawfully in occupancy thereof by serving upon the said Lucy Heustis a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such [79] housing accommodations shall not thereafter be offered for rent as such. That the defendants commenced such proceedings and served such notice for the expressly avowed purpose of making said housing accommodations vacant in order that the same might be sold to persons who would purchase such housing accommodations for use as their residences.

X.

That on or about June 3, 1948 the defendants, as landlords, commenced proceedings to evict from the housing accommodations at 3533 Fashion Avenue, Long Beach, California, one, Paul R. Moberly, a tenant thereof and other persons lawfully in occupancy thereof by serving upon the said Paul R. Moberly a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental mar-

ket and such housing accommodations shall not thereafter be offered for rent as such. That the defendants commenced such proceedings and served such notice for the expressly avowed purpose of making said housing accommodations vacant in order that the same might be sold to persons who would purchase such housing accommodations for use as their residences.

XI.

That on or about June 3, 1948 the defendants, as landlords, commenced proceedings to evict from the housing accommodations at 3557 Fashion Avenue, Long Beach, California, one, Henry Monkiewicz, a tenant thereof and other persons lawfully in occupancy thereof by serving upon the said Henry Monkiewicz a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such. That the defendants commenced such proceedings and served such notice for the expressly avowed purpose of making said housing accommodations vacant in order that the same might be sold to persons who would purchase such housing accommodations for use as their residences. [80]

XII.

That said acts hereinabove alleged are in violation of the provisions of the Housing and Rent Act of 1947 as amended, that unless defendants are

restrained from further acts in furtherance of their design set forth above, they will evict said tenants and said defendant Sydney Mark Taper and Wardlow Annex, Inc., and Harding Manor, Inc., of which he is president and a major stockholder, will proceed to evict numerous tenants in numerous housing accommodations under similar circumstances and for similar purposes as hereinabove set forth.

Wherefore, the plaintiff demands:

A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from:

1. Evicting said Lucy A. Heustis and other persons now in occupancy at the premises at 3500 Easy Avenue, Long Beach, California, from said premises.

2. Evicting said Paul R. Moberly and other persons now in occupancy at the premises at 3533 Fashion Avenue, Long Beach, California, from said premises.

3. Evicting said Henry Monkiewicz and other persons now in occupancy at the premises at 3557 Fashion Avenue, Long Beach, California, from said premises.

4. Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Hous-

ing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

5. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing. [81]

6. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

7. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded, by accepting, demanding, or receiving, in any form or manner, rents higher than the established maximum rent prescribed therein.

Dated Los Angeles, California, this 19th day of July, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ CASSEL JACOBS,

Attorneys for Plaintiff. [82]

State of California, County of Los Angeles,
United States of America—ss.

Ruth Rauh, being first duly sworn, deposes and says:

That plaintiff is absent from the County of Los Angeles; that the undersigned is an employee of

the United States Government, and during the time specified in the complaint, as hereinabove set forth, she was employed as a Compliance Negotiator [R.R.] for the Office of the Housing Expediter, an agency of the United States Government; that in the course of her duty as a Compliance Negotiator [R.R.] for the Office of the Housing Expediter she made an investigation of and became familiar with the facts involved in the above-mentioned action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that she believes it to be true.

/s/ RUTH RAUH.

Subscribed and Sworn to before me this 19th day of July, 1948.

(Seal) /s/ H. C. ZECH,

Notary Public in and for said County and State.

My Commission expires Oct. 26, 1951.

[Endorsed]: Filed July 20, 1948. [83]

[Title of District Court and Cause.]

AFFIDAVITS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [84]

AFFIDAVIT OF CHARLES H. BLAYLOCK

State of California,

County of Los Angeles—ss.

I, Charles H. Blaylock, having been first duly sworn, depose and say, as follows:

That I am Associate Area Rent Director for the Los Angeles Defense Rental Area, Office of the Housing Expediter, in charge of the operations of the Los Angeles Defense Rental Area Office at Long Beach, California. That I am familiar with the records of the Los Angeles Defense Rental Area Office relating to the housing accommodations located at the following addresses:

3500 Easy Avenue, Long Beach, California, and
3533 Fashion Avenue, Long Beach, California.

That said records of the Area Rent Office relating to said housing accommodations show that said housing accommodations are controlled housing [85] accommodations and that they are subject to the provisions of the Rent Regulation for Controlled Housing. Mr. Sydney Mark Taper and corporations with which he is associated are the landlords of numerous housing accommodations in the Long Beach Area.

Dated July 15th, 1948.

/s/ CHARLES H. BLAYLOCK.

Subscribed and sworn to before me this 15th day of July, 1948.

(Seal) /s/ CORA A. KIRCHNER,
Notary Public in and for the above County and State.

My Commission expires 11-11-51.

[86]

AFFIDAVIT OF RUTH RAUH

State of California,

County of Los Angeles—ss.

I, Ruth Rauh, having been first duly sworn, depose and say, as follows:

That I am an employee of the Los Angeles Defense Rental Area Office, Office of the Housing Expediter, and my duties relate to housing accommodations in the Long Beach, California, Area. That as such employee I interviewed Mr. Harold C. Frerks, Attorney for Sydney Mark Taper, President of Wardlow Heights, Inc., Harding Manor, Inc., and Wardlow Annex, Inc. That Mr. Frerks, as attorney for Mr. Taper, signed the following statement which is on file in the records of the Los Angeles Defense Rental Area Office at Long Beach, California:

“I believe that the O.H.E. opinion as to this section relate to where a certain purchaser or sale is involved, and not as to where a landlord intends to get possession so that he can redecorate or add a room to the place for [87] any future sale to parties unknown, who will occupy the place for themselves and not for rental purposes. H. C. Frerks.”

That the above statement of Mr. Frerks was made in connection with a notice to quit, served by Harding Manor, Inc. on Alvin L. Fite, et al, respecting the premises at 2538 Gale Avenue, Long Beach, California, and concerning an eviction notice

served by Wardlow Annex, Inc., by S. M. Taper, on Max Ravnitzky, et al, relating to the premises at 3733 Easy Avenue, Long Beach, California.

That the statement had reference to housing and to Memorandum No. 51 issued by B. W. Diggle, Deputy Housing Expediter, Rent Operations, and Robert A. Sauer, Assistant General Counsel, Regulations and Appeals Branch, Office of the Housing Expediter, Washington, D. C., which states, in part, as follows:

“To Secure Vacant Possession for Purposes of Sale.

“Section 209(a)(5) permits eviction where ‘the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market . . .’ Since this is only one of several grounds for eviction under the Act, it is clear that it was not intended that this section should broaden or defeat the purpose of limitations placed in the other grounds. It follows, therefore, that since Section 209(a)(3) provides for eviction where ‘the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser;’ Section 209(a)(5) may not be used in cases where sales are involved. That is to say, since a tenant may be evicted for occupancy by a purchaser under Section 209(a)(3), a landlord may not evict under Section 209(a)(5) for the purpose of obtaining vacant possession in order to sell. [88]

“Section 206(b) of the Act authorizes the Housing Expediter to seek injunction against violations of the eviction provisions and consequently, any violations of the eviction restriction referred to above may be referred to Litigation for appropriate action.”

Mr. Frerks further stated to me, at the time he signed the above statement on June 11, 1948, at the Long Beach Office of the Housing Expediter, 110 East Anaheim Street, Long Beach, California, that the above premises are to be repaired and generally remodeled and eventually sold to prospective purchasers, that it is the intention to take the cases into court for the court's decision on eviction. I advised Mr. Frerks that the reason stated in the notice to quit would seem to be in violation of Section 209(a)(5) of the Housing and Rent Act of 1947 as amended, in that it does involve a sale of the housing accommodations.

It is my impression, as a result of my conversation with Mr. Frerks that his clients named above are about to commence eviction proceedings in numerous instances.

Dated July 15th, 1948.

/s/ RUTH RAUH.

Subscribed and sworn to before me this 15th day of July, 1948.

(Seal) /s/ CORA A. KIRCHNER,
Notary Public in and for the above County and State.

My Commission expires 11-11-51.

[89]

AFFIDAVIT OF LUCY A. HEUSTIS

State of California,
County of Los Angeles—ss.

I, Lucy A. Heustis, having been first duly sworn, depose and say, as follows:

That on or about June 3, 1948, Wardlow Heights, Inc., by S. M. Taper, President, as landlord of the premises wherein I reside at 3500 Easy Avenue, Long Beach, California, served me with a written notice to quit said premises at the expiration of sixty days after service of the notice.

Dated July 6, 1948.

/s/ LUCY A. HEUSTIS.

Subscribed and sworn to before me this 6th day of July, 1948.

(Seal) /s/ (Illegible.)

Notary Public in and for the above County and State.

My Commission expires October 31, 1951. [90]

AFFIDAVIT OF PAUL R. MOBERLY

State of California,
County of Los Angeles—ss.

I, Paul R. Moberly, having been first duly sworn, depose and say, as follows:

That on or about June 3, 1948, Wardlow Heights, Inc., by S. M. Taper, President, as landlord of the premises wherein I reside at 3533 Fashion Avenue,

Long Beach, California, served me with a written notice to quit said premises at the expiration of sixty days after service of the notice.

Dated July 6, 1948.

/s/ PAUL R. MOBERLY.

Subscribed and sworn to before me this 6th day of July, 1948.

(Seal) /s/ (Illegible.)

Notary Public in and for the above County and State.

My Commission expires Jan. 8, 1950. [91]

AFFIDAVIT OF HENRY MONKIEWICZ

State of California,
County of Los Angeles—ss.

I, Henry Monkiewicz, having been first duly sworn, depose and say, as follows:

That on or about June 3, 1948, Harding Manor, Inc., by S. M. Taper, President, as landlord of the premises wherein I reside at 3557 Fashion Avenue, Long Beach, California, served me with a written notice to quit said premises at the expiration of sixty days of the notice.

Dated July 8, 1948.

/s/ HENRY MONKIEWICZ.

Subscribed and sworn to before me this 8th day of July, 1948.

(Seal) /s/ CORA A. KIRCHNER,

Notary Public in and for above County and State.

My Commission expires 11-11-51.

[Endorsed]: Filed July 20, 1948. [92]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified complaint, memorandum of points and authorities and affidavits filed by plaintiff, and good cause appearing therefor:

It Is Hereby Ordered that defendants Sydney Mark Taper and Wardlow Heights, Inc., appear before this Court in Courtroom Number 3 on the second floor of the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 26th day of July, 1948, at 10:00 o'clock a.m. in the forenoon, or as soon thereafter as the matter can be heard, and show cause, if any there be, why this Court, pending trial of this action, should not grant a preliminary injunction restraining the defendants, their agents, servants and employees and all persons in active concert or participation with them according to the prayer of the complaint.

It Is Further Ordered that a copy of the affidavits and points and [93] authorities filed by the plaintiff and a copy of this order be served with the summons and complaint herein upon defendants Sydney Mark Taper and Wardlow Heights, Inc., not later than the 22nd day of July, 1948.

Dated Los Angeles, California, this 20th day of July, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed July 20, 1948. [94]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The plaintiff having filed his verified complaint and his affidavits and memorandum of points and authorities in support of his motion for preliminary injunction and the defendants, Sydney Mark Taper, and Wardlow Heights, Inc., through its President, Sydney Mark Taper, each having been personally served with a copy of the verified complaint, a copy of the order to show cause, a copy of the memorandum of points and authorities and affidavits in support of plaintiff's motion for preliminary injunction on the 22nd day of July, 1948, and the cause having come on regularly for hearing on the 26th day of July, 1948, before the Honorable Peirson M. Hall, Judge Presiding, and the plaintiff being represented by Frank L. Hirst, Esq., and said defendants not appearing in person or by counsel, and said cause having been continued by order of the [95] Court for hearing to the 27th day of July, 1948, at 10:00 o'clock a.m., at which time the cause was submitted on plaintiff's verified complaint, affidavits and memorandum of points and authorities in support of his motion for preliminary injunction, no evidence having been offered in opposition to plaintiff's motion by said defendants, and no affidavits having been filed by them in opposition to said motion, and the Court having considered all of the allegations in said verified complaint and said affidavits, the said alle-

gations being unopposed and the Court being fully apprised of the premises, makes the following

FINDINGS OF FACT

1. That the plaintiff as Housing Expediter, Office of the Housing Expediter, brings this action for an injunction and makes his motion for a preliminary injunction pursuant to Section 206 of the Housing and Rent Act of 1947, as amended, for the purpose of enjoining the defendants from evicting from the hereinafter described housing accommodations the hereinafter described persons.

2. That jurisdiction of this action is conferred on this Court by Section 206 of the Housing and Rent Act of 1947, as amended.

3. That the defendant Wardlow Heights, Inc., is a corpoartion, duly authorized and existing under the laws of the State of California.

4. That at all times hereinafter mentioned the defendants were the landlords of the housing accommodations located at 3500 Easy Avenue, 3533 and 3557 Fashion Avenue, Long Beach, California.

5. That at all times pertinent hereto there was an effect in the Los Angeles Defense Rental Area a Controlled Housing Rent Regulation (12 F. R. 1331).

6. That at all times pertinent hereto the housing accommodations hereinabove described were subject to said aforementioned [96] Act and Regulation, particularly Section 209 of said Act.

7. That the defendants Sydney Mark Taper and Wardlow Heights, Inc., are residents within the

County of Los Angeles, State of California, having their principal place of business within said county and are within the jurisdiction of this Court.

8. That on or about June 3, 1948, said defendants, as landlords, commenced proceedings to evict from the housing accommodations at 3500 Easy Avenue, Long Beach, California, one, Lucy A. Heustis, a tenant thereof, and other persons lawfully in occupancy thereof by serving upon the said Lucy A. Heustis a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of said housing accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market and such housing accommodations are not thereafter to be offered for rent as such.

9. That on or about June 3, 1948, said defendants, as landlords commenced proceedings to evict from the housing accommodations at 3533 Fashion Avenue, Long Beach, California, one, Paul R. Moberly, a tenant thereof, and other persons lawfully in occupancy thereof by serving upon the said Paul R. Moberly a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of said housing accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market and such housing accommodations are not thereafter to be offered for rent as such.

10. That on or about June 3, 1948, said defendants, as landlords commenced proceedings to evict

from the housing accommodations at 3557 Fashion Avenue, Long Beach, California, one, Henry Monkiewicz, a tenant thereof, and other persons lawfully in occupancy thereof by serving upon the said Henry Monkiewicz a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of said housing [97] accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market and such housing accommodations are not thereafter to be offered for rent as such.

11. That said defendants commenced such proceedings and served such notices for the expressly avowed purpose of making said housing accommodations vacant in order that same might be redecorated and thereafter sold to persons who would purchase such housing accommodations for use as their residences.

12. That said defendants are engaged in evicting tenants from other housing accommodations subject to said Act and said Regulation of which they are the landlords individually and under the guise of corporate structure by serving notices to quit similar to the notices to quit hereinabove described and with the same expressly avowed purpose as hereinabove set forth.

13. That unless defendants are restrained from further acts in furtherance of their design set forth above they will evict said tenants and said Sydney Mark Taper and Wardlow Heights, Inc., of which said Sydney Mark Taper is President and a major stockholder, will proceed to evict numerous

other tenants in numerous other controlled housing accommodations owned, controlled or managed by said defendants, under similar circumstances and for the same purpose as hereinabove set forth.

From the above findings of fact, the Court makes the following

CONCLUSIONS OF LAW

1. That the purpose for which said defendants Sydney Mark Taper and Wardlow Heights, Inc., have commenced said eviction proceedings and served said notices to quit on said Lucy A. Heustis, Paul R. Moberly and Henry Monkiewicz, and said other tenants hereinabove referred to does not constitute a proper ground for eviction within the meaning of Section 209(a)(5) of said Housing and [98] Rent Act of 1947, as amended, or any other subdivision of said Section 209.

2. That the plaintiff herein is entitled to a preliminary injunction, pending the determination of the Court on plaintiff's complaint for a permanent injunction, enjoining the defendants Sydney Mark Taper and Wardlow Heights, Inc., their agents, servants, employees, attorneys, officers and directors, and all other persons in active concert or participation with them from:

(a) Evicting Lucy A. Heustis and all other persons in occupancy of the housing accommodations located at 3500 Easy Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of

1947, as amended, and on the grounds and for the purposes stated therein.

(b) Evicting Paul R. Moberly and all other persons in occupancy of the housing accommodations located at 3533 Fashion Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947, as amended, and on the grounds and for the purposes stated therein.

(c) Evicting Henry Monkiewicz and all other persons in occupancy of the housing accommodations located at 3557 Fashion Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947, as amended, and on the grounds and for the purposes stated therein.

(d) Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947, and [99] Regulations issued thereunder, as heretofore or hereafter amended or superseded.

(e) Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other

essential services and utilities, or threatening to do any of the foregoing.

Dated Los Angeles, California, this 27th day of July, 1948.

/s/ PEIRSON M. HALL,
Judge, U. S. District Court.

Presented by:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

[Endorsed]: Filed July 27, 1948. [100]

[Title of District Court and Cause.]

DECREE FOR PRELIMINARY INJUNCTION

This cause came on regularly for hearing on the motion of the plaintiff for a preliminary injunction on July 26, 1948, before the Honorable Peirson M. Hall, Judge Presiding, and was continued for hearing to July 27, 1948, at 10:00 o'clock a.m. Plaintiff was represented by Frank L. Hirst, Esq., and the defendants Sydney Mark Taper and Wardlow Heights, Inc., were not present and not represented by counsel. The Court having considered plaintiff's verified complaint and affidavits and memorandum of points and authorities in support

of plaintiff's motion for a preliminary injunction, said defendants not having submitted either affidavits or other evidence, and the Court having this day made its written findings of fact and conclusions of law, and being fully advised in the premises, now therefor, [101]

It Is Hereby Ordered, Adjudged and Decreed that the defendants Sydney Mark Taper and Wardlow Heights, Inc., their agents, servants, employees, attorneys, officers and directors and all other persons in active concert or participation with them are hereby enjoined and restrained until further order of the Court herein from:

1. Evicting Lucy A. Heustis and all other persons in occupancy of the housing accommodations located at 3500 Easy Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947, as amended, and on the grounds and for the purposes stated therein.

2. Evicting Paul R. Moberly and all other persons in occupancy of the housing accommodations located at 3533 Fashion Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947, as amended, and on the grounds and for the purposes stated therein.

3. Evicting Henry Monkiewicz and all other persons in occupancy of the housing accommodations located at 3557 Fashion Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947, as amended, and on the grounds and for the purposes stated therein.

4. Engaging in any action or course of action the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947, and Regulations issued thereunder, as heretofore or hereafter amended or superseded. [102]

5. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

Dated Los Angeles, California, this 27th day of July, 1948, 4:55 p.m.

/s/ PEIRSON M. HALL,
Judge, U. S. District Court.

Presented by:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

Judgment entered July 28, 1948. Docketed July 28, 1948. Book, 52, page 272.

[Endorsed]: Filed July 27, 1948. [103]

[Title of District Court and Cause.]

ANSWER

Come Now the defendants, Sydney Mark Taper, Harding Manor, Inc., a corporation, Wardlow Annex, Inc., a corporation, and Wardlow Heights, Inc., a corporation, and answering the complaint of the plaintiff on file herein admit, deny and allege as follows:

I.

Answering Paragraph V, these defendants admit that at all times mentioned in the complaint there was in effect the Housing and Rent Act of 1947 as amended by the Housing and Rent Act of 1948, and admit that the property of the defendants is in the Los Angeles Defense Rental Area which is a controlled housing rent area, and that there was in effect in the Los Angeles Defense Rental Area a controlled housing rent regulation (12 F. R. 4331). [104]

II.

Answering Paragraph IX, these defendants admit that on or about, to-wit, the third day of June, 1948, the defendant, Wardlow Heights, Inc., a corporation, as landlord, commenced proceedings to evict from the housing accommodations at 3500 Easy Avenue, Long Beach, California, Lucy A. Heustis, a tenant thereof, and that there was served upon said Lucy A. Heustis a notice to quit, which said notice set forth that the landlord desired in good faith to recover possession of the housing accommodations for the immediate purpose of with-

drawing such housing accommodations from the rental market and that such housing accommodations would not thereafter be offered for rent as such. Admit that the defendants commenced the proceedings and served the notice and admit that the purpose of such notice was for the purpose of evicting the said Lucy A. Heustis, but deny that there was any bad faith or other ulterior motives on the part of the said landlord and defendant, Wardlow Heights, Inc.; deny each and every other allegation in said paragraph contained.

III.

Answering Paragraph X these defendants admit that on or about, to-wit, the third day of June, 1948, the defendants, Wardlow Heights, Inc., a corporation, as landlord, commenced proceedings to evict from the housing accommodations at 3533 Fashion Avenue, Long Beach, California, Paul R. Moberly, a tenant thereof, and that there was served upon said Paul R. Moberly a notice to quit, which said notice set forth that the landlord desired in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and that [105] such housing accommodations would not thereafter be offered for rent as such. Admit that the defendants commenced the proceedings and served the notice and admit that the purpose of such notice was for the purpose of evicting the said Paul R. Moberly, but deny that there was any bad faith or other ulterior motives on the part of the said landlord and defend-

ants Wardlow Heights, Inc.; deny each and every other allegation in said paragraph contained.

IV.

Answering Paragraph XI these defendants admit that on or about, to-wit, the third day of June, 1948, the defendant Wardlow Heights, Inc., a corporation, as landlord, commenced proceedings to evict from the housing accommodations at 3557 Fashion Avenue, Long Beach, California, Henry Monkiewicz, a tenant thereof, and that there was served upon said Henry Monkiewicz a notice to quit, which said notice set forth that the landlord desired in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and that such housing accommodations would not thereafter be offered for rent as such. Admit that the defendants commenced the proceedings and served the notice and admit that the purpose of such notice was for the purpose of evicting the said Henry Monkiewicz, but deny that there was any bad faith or other ulterior motives on the part of the said landlord and defendant, Wardlow Heights, Inc.; deny each and every other allegation in said paragraph contained.

V.

Answering Paragraph XII, these defendants deny that said acts hereinbefore referred to and as set forth in the plaintiff's complaint are in violation of the [106] provisions of the Housing and Rent Act of 1947, as amended; on the contrary, allege that said acts are within the provisions of

the regulations; deny each and every other allegation in said paragraph contained.

For a first separate and affirmative defense, these defendants set forth:

I.

That the defendants are the owners of the real property described in the plaintiff's complaint and that said properties have been leased to the persons mentioned in said complaint since the early part of 1945; that the property at 3557 Fashion Avenue was leased to Henry Monkiewicz on or about the 15th day of January, 1945, at a rental of Fifty Dollars (\$50.00) per month, which at that time was in accordance with the O.P.A. ceiling price fixed for said property.

II.

That at the time said premises were leased to Henry Monkiewicz, the said Henry Monkiewicz agreed to maintain said property in good order, to keep the lawns watered and to keep the premises in a clean and healthy condition.

III.

Defendants allege that the property occupied by said Henry Monkiewicz was so maintained by the said Henry Monkiewicz so as to be dirty, filthy and in a complete state of disrepair; that the said Henry Monkiewicz permitted windows to be broken, hardwood floors to be marred and scratched with the floors being worn; that the linoleum was torn from the floor; that the window shades were broken and torn; that the premises were so [107] misused so as to have marks on all the plaster walls; that

the windows were jarred loose from the frames; that the toilet seat was broken; that the woodwork was scratched; that the lawns were unwatered and dry to the point of needing replacement; that said Henry Monkiewicz permitted the back yard to be littered with debris so as to need a complete replanting; that the screens were broken and torn; that the tile was chipped and broken; that said property was so badly abused as to cause the same to depreciate in value and become unmerchantable and unsalable.

IV.

That in addition thereto the said house was leased to said Monkiewicz in January of 1945 at a rental of Fifty Dollars (\$50.00) per month and that since that date the cost of maintaining said property has so increased as to cause the defendants to sustain a loss as a result of its rental of said property at said figure. That the said house has a value of approximately Nine Thousand Dollars (\$9,000.00) and that the following costs and expenditures are necessary in connection with the operation of said property, to-wit:

Taxes: \$110.00 per year.

Interest to the Bank of America under F.H.A. Insured Loan, including $\frac{1}{2}\%$ F.H.A. insurance: \$215.00 per year.

Fire insurance: \$12.00 per year.

Depreciation at 4% per year: \$294.00 per year.

Repairs consisting of redecorating or repairing the outside (on a basis of once every three years)

at [108] an average cost of \$86.00 or a cost of \$28.66 per year.

Replacement of screens at a cost of \$11.00 per year.

Repairs to plumbing, windows and miscellaneous repairs on an average of \$13.00 per year.

Total cost of maintenance of said property: \$708.00 per year; or a net cost of approximately \$59.00 per month, exclusive of any return to the defendants on their investment and exclusive of any major repairs such as the replacement of the roof, replacement of lawns, replacement of worn-out plumbing or tile, replacement of water heaters, replacement of heating system or other usual and customary replacements which have to be made over a period of years.

V.

Defendants further set forth that the payments which the said Henry Monkiewicz was making to the defendants were in the sum of Fifty Dollars (\$50.00) per month or Six Hundred Dollars (\$600.00) per year and that the defendants were sustaining a loss of Nine Dollars (\$9.00) per month or One Hundred Eight Dollars (\$108.00) per year without taking into account any consideration for a return on the capital investment of the defendants, without allowance for the collection of rents, without allowance for the office overhead and supervisory duties of the defendants and their employees, without allowance for accounting fees and the various and sundry other charges usually entailed in the handling and rental of property.

VI.

Defendants further set forth that upon it appearing that the defendants were sustaining a loss as set forth in the preceding paragraphs, they made application with the Office of Housing Expediter Ben C. Koepke, and that after expending several hundred dollars for obtaining the necessary information including the time of the agents and representatives of the defendants in gathering information [109] requested by the Housing Expediter, the Housing Expediter allowed a rent increase of One and twenty-five/one-hundredths Dollars (\$1.25) per month or a total of Fifteen Dollars (\$15.00) per year so that notwithstanding the increase in rent of One and twenty-five/one-hundredths Dollars per month the defendants were still sustaining a loss of Ninety-three Dollars (\$93.00) per year and this without allowing anything to the defendants for office overhead, collection of rents, or any return on the investment of the defendants, nor for the replacement costs of damages to the property if the same was maintained for any period of time; that notwithstanding such increase, defendants were sustaining a loss of Two Hundred Twenty-five Dollars (\$225.00) per year on said house.

VII.

That thereupon, the defendants elected to remove said property from the housing market and to have property placed in such condition at an expenditure of several hundred dollars so as to be in a position to sell said property, and that the only purpose of reaching the conclusion to sell said

property was by reason of the fact that the defendants could not obtain the necessary relief which would prevent them from taking the losses which they were sustaining from the rental of said property.

VIII.

That is said properties were not disposed of at the present time, not only would the defendants be taking a loss on their property during the time it was occupied, but that the market value of said property which is now fixed at the sum of approximately Nine Thousand Dollars (\$9,000.00) may in the future drop and that in such event the defendants would not be able to dispose of the property at its present value; that likewise, at a later date the property may depreciate so that event at a rental of Fifty Dollars (\$50.00) per month, they would then sustain great losses, whereas if the defendants were now permitted to dispose of said [110] property they could do so without a loss and recover their investment.

IX.

That thereupon, Henry Monkiewicz vacated the said property and the said Henry Monkiewicz is not now a tenant of the defendants.

For a second separate and affirmative defense, these defendants allege:

I.

Defendants adopt and reallege all of their allegations of the First Affirmative Defense and make the same a part hereof, as though the same were fully set forth at length herein.

II.

That under the Housing Act as hereinbefore referred to, the defendants had the right to remove said property from the rental market and that in that connection they set forth that Title II of the Housing and Rent Act of 1947 as amended by the Housing and Rent Act of 1948, Section 209-A, Subdivision 5, provides that: "The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing the housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such."

III.

Defendants set forth that they do intend to recover the possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and the defendants represent that the said housing accommodations will not be offered for rent as such and that the defendants will not rent said housing accommodations but will remove them from the rental market; that the defendants have the right to remove said housing accommodations from the rental market and have a right to evict any tenant occupying said premises for such purposes.

For a third separate and affirmative defense, these defendants set forth:

I.

That the defendants are the owners of the real property described in the plaintiff's complaint and

that said properties have been leased to the persons mentioned in said complaint since the early part of 1945; that the property at 3500 Easy Avenue, Long Beach, California, was leased to Lucy A. Heustis on or about the 15th day of January, 1945, at a rental of Fifty Dollars (\$50.00) per month, which at that time was in accordance with the O.P.A. ceiling price fixed for said property.

II.

That at the time said premises were leased to Lucy A. Heustis the said Lucy A. Heustis agreed to maintain said property in good order, to keep the lawns watered and to keep the premises in a clean and healthy condition.

III.

Defendants allege that the property occupied by said Lucy A. Heustis was so maintained by the said Lucy A. Heustis as to be dirty, filthy and in a complete state of disrepair; that the said Lucy A. Heustis permitted windows to be broken, hardwood floors to be marred and scratched with the floors being worn; that the linoleum was torn from the floor; that the window shades were broken and torn; that the premises were so misused so as to have marks on all the plaster walls; that the windows were jarred loose from the frames; that the toilet seat was broken; that the woodwork was scratched; that the lawns were unwatered and dry to the point of needing replacement; that said Lucy A. Heustis permitted the back yard to be littered with debris so as to need a complete replant-

ing; that the screens were broken and torn; that the tile was chipped and broken; that said property was so badly abused as to cause the same to depreciate in value and become unmerchantable [112] and unsalable.

IV.

That in addition thereto, the said house was leased to said Heustis in January of 1945 at a rental of Fifty Dollars (\$50.00) per month and that since said date the cost of maintaining said property has so increased as to cause the defendants to sustain a loss from its rental at said figure. That the said house has a value of approximately Nine Thousand Dollars (\$9,000.00) and that the following costs and expenditures are necessary in connection with the operation of said property, to-wit:

Taxes: \$110.00 per year.

Interest to the Bank of America under F.H.A. insured loan including $1\frac{1}{2}\%$ F.H.A. insurance: \$215.00 per year.

Fire insurance: \$12.00 per year.

Depreciation at 4% per year: \$294.00 per year.

Repairs consisting of redecorating or repairing the outside (on a basis of once every three years) at an average cost of \$86.00 or a cost of \$28.66 per year.

Replacement of screens at a cost of \$11.00 per year.

Repairs to plumbing, windows and miscellaneous repairs on an average of \$13.00 per year.

Total cost of maintenance of said property: \$708.00 per year; or a net cost of approximately

Fifty-nine Dollars (\$59.00) per month, exclusive of any return to the defendants on their investment and exclusive of any major repairs such as the replacement of the roof, replacement of lawns, replacement of worn-out plumbing or tile, replacement of water heaters, replacement of heating [113] system or other usual and customary replacements which have to be made over a period of years.

V.

Defendants further set forth that the payments which the said Lucy A. Heustis was making to the defendants were in the sum of Fifty Dollars (\$50.00) per month or Six Hundred Dollars (\$600.00) per year and that the defendants were sustaining a loss of Nine Dollars (\$9.00) per month or One Hundred Eight Dollars (\$108.00) per year without taking into account any consideration for a return to the capital investment of the defendants, without allowance for the collection of rents, without allowance for the office overhead and supervisory duties of the defendants and their employees, without allowances for accounting fees and the various and sundry other charges usually entailed in the handling and rental of property.

VI.

Defendants further set forth that upon it appearing that the defendants were sustaining a loss as set forth in the preceding paragraphs, they made application with the Office of Housing Expediter, Ben C. Koepke, and that after expending several hundred dollars for obtaining the necessary information including the time of the agents and repre-

representatives of the defendants, the Housing Expediter allowed a rent increase of One and twenty-five/one-hundredths Dollars (\$1.25) per month or a total of Fifteen Dollars (\$15.00) per year so that notwithstanding the increase in rent of One and twenty-five/one-hundredths Dollars (\$1.25) per month the defendants were still sustaining a loss of Ninety-three Dollars (\$93.00) per year and this without allowing anything to the defendants for office overhead, collections of rents, or any return on the investment of the defendants, nor for the replacement costs of damages to the property if the same was maintained for any period of time. [114]

VII.

That thereupon, the defendants elected to remove said property from the housing market and to have said property placed in such condition at an expenditure of several hundred dollars so as to be in a position to sell said property, and that the only purpose of reaching the conclusion to sell said property was by reason of the fact that the defendants could not obtain the necessary relief which would prevent them from taking the losses which they were sustaining from the rental of said property.

VIII.

That if said properties were not disposed of at the present time not only would the defendants be taking a loss on their property during the time it was occupied, but that the market value of said property which is now fixed at the sum of approximately Nine Thousand Dollars (\$9,000.00) may in

the future drop and that in such event, the defendants would not be able to lease the property even at a rental of Fifty Dollars (\$50.00) per month and they would then sustain greater losses, whereas if the defendants were now permitted to dispose of said property, they could do so without a loss.

For a fourth separate and affirmative defense these defendants allege:

I.

Defendants adopt and reallege all of their allegations of the Third Affirmative Defense and make the same a part hereof, as though the same were fully set forth at length herein.

II.

That under the Housing Act as hereinbefore referred to, the defendants had the right to remove said property from the rental market and that in connection they set forth that Title II of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, Section 209-A Subdivision 5, provides that: [115] "The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing the housing accommodation from the rental market, and such housing accommodations shall not thereafter be offered for rental as such."

III.

Defendants set forth that they do intend to recover the possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental mar-

ket and the defendants represent that the said housing accommodations will not be offered for rent as such and that the defendants will not rent said housing accommodations but will remove them from the rental market and that as such, the defendants have the right to remove said housing accommodations from the rental market and have a right to evict any tenant occupying said premises for such purposes.

For a fifth separate and affirmative defense, these defendants set forth:

I.

That the defendants are the owners of the real property described in the plaintiff's complaint and that said properties have been lease to the persons mentioned in said complaint since the early part of 1945; that the property at 3533 Fashion Avenue, Long Beach, California, was leased to Paul R. Moberly on or about the 15th day of January, 1945 at a rental of Fifty Dollars (\$50.00) per month, which at that time was in accordance with the O.P.A. ceiling price fixed for said property.

II.

That at the time said premises were leased to Paul R. Moberly, the said Paul R. Moberly agreed to maintain said property in good order, to keep the lawns watered and to keep the premises in a clean and healthy condition. [116]

III.

Defendants allege that the property occupied by said Paul R. Moberly was so maintained by the said Paul R. Moberly as to be dirty, filthy and in

a complete state of disrepair; that the said Paul R. Moberly permitted windows to be broken, hard wood floors to be marred and scratched with the floors being worn; that the linoleum was torn from the floor; that the window shades were broken and torn; that the premises were so misused as to have marks on all the plaster walls; that the windows were jarred loose from the frames; that the toilet seat was broken; that the woodwork was scratched that the lawns were unwatered and dry to the point of needing replacement; that said Paul R. Moberly permitted the back yard to be littered with debris so as to need a complete replanting; that the screens were broken and torn; that the tile was chipped and broken; that said property was so badly abused as to cause the same to depreciate in value and become unmerchantable and unsalable.

IV.

That in addition thereto the said house was leased to said Moberly in January of 1945 at a rental of Fifty Dollars (\$50.00) per month and that since said date, the cost of maintaining said property has so increased as to cause the defendants to sustain a loss from its rental at said figure. That the said house has a value of approximately Nine Thousand Dollars (\$9,000.00) and that the following costs and expenditures are necessary in connection with the operation of said property to-wit:

Taxes; \$110.00 per year.

Interest to the Bank of America under F.H.A.

insured loan including $1\frac{1}{2}\%$ F.H.A. insurance; \$215.00 per year.

Fire insurance; \$12.00 per year.

Depreciation at 4% per year; \$294.00 per year.

Repairs consisting of redecorating [117] or repairing the outside (on a basis of once every three years) at an average cost of \$86.00 or a cost of \$28.66 per year.

Replacement of screens at a cost of \$11.00 per year.

Repairs to plumbing, windows and miscellaneous repairs on an average of \$13.00 per year.

Total cost of maintenance of said property; \$708.00 per year; or a net cost of approximately Fifty-nine Dollars (\$59.00) per month, exclusive of any return to the defendants on their investment and exclusive of any major repairs such as the replacement of the roof, replacement of lawns, replacement of worn-out plumbing or tile, replacement of water heaters, replacement of heating system or other usual and customary replacements which have to be made over a period of years.

V.

Defendants further set forth that the payments which the said Paul R. Moberly was making to the defendants were in the sum of Fifty Dollars (\$50.00) per month or Six Hundred Dollars (\$600.00) per year and that the defendants were sustaining a loss of Nine Dollars (\$9.00) per month or One Hundred Eight Dollars (\$108.00) per year

without taking into account any consideration for a return to the capital investment of the defendants, without allowance for the collection of rents without allowance for the office overhead and supervisory duties of the defendants and their employees without allowances for accounting fees and the various and sundry other charges usually entailed in the handling of rental of property.

VI.

Defendants further set forth that upon it appearing that [118] the defendants were sustaining a loss as set forth in the preceding paragraphs, they made application with the Office of Housing Expediter, Ben C. Koepke, and that after expending several hundred dollars for obtaining the necessary information including the time of the agent and representatives of the defendants, the Housing Expediter allowed a rent increase of One and twenty-five/one-hundredths Dollars (\$1.25) per month or a total of Fifteen Dollars (\$15.00) per year so that notwithstanding the increase in rent of One and Twenty-five/one-hundredths Dollars (\$1.25) per month the defendants were still sustaining a loss of Ninety-three Dollars (\$93.00) per year and this without allowing anything to the defendants for office overhead, collection of rents or any return on the investment of the defendants nor for the replacement costs of damages to the property if the same was maintained for any period of time.

VII.

That thereupon, the defendants elected to remove said property from the housing market and to have said property placed in such condition at an expenditure of several hundred dollars so as to be in a position to sell said property, and that the only purpose of reaching the conclusion to sell said property was by reason of the fact that the defendants could not obtain the necessary relief which would prevent them from taking the losses which they were sustaining from the rental of said property.

VIII.

That if said properties were not disposed of at the present time, not only would the defendants be taking a loss on their property during the time it was occupied, but that the market value of said property which is now fixed at the sum of approximately Nine Thousand Dollars (\$9,000.00) may in the future drop and that in such event the defendants would not be able to lease the property even at a rental of Fifty Dollars (\$50.00) per month [119] and they would then sustain greater losses, whereas if the defendants were now permitted to dispose of said property they could do so without loss.

For a sixth separate and affirmative defense, these defendants allege:

I.

Defendants adopt and reallege all of their allegations of the Fifth Affirmative Defense and make

the same a part hereof, as though the same were fully set forth at length herein.

II.

That under the Housing Act as hereinbefore referred to, the defendants had the right to remove said property from the rental market and that in that connection they set forth that Title II of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, Section 209-A Subdivision 5, provides that: "The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing the housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such."

III.

Defendants set forth that they do intend to recover the possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and the defendants represent that the said housing accommodations will not be offered for rent as such and that the defendants will not rent said housing accommodations but will remove them from the rental market and that as such the defendants have the right to remove said housing accommodations from the rental market and have the right to evict any tenant occupying said premises for such purpose.

Wherefore, defendants pray that they have judgment and [120] that the preliminary injunction heretofore issued be dissolved and that the action as to the property concerning Henry Mor

wiecz be dismissed; that the Court decree that the defendants have the right to evict tenants in possession for the purpose of removing said housing accommodations from the rental market upon condition that the defendants do not offer said property for rent.

ALBERT H. ALLEN &

HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,

Attorneys for Defendants.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 10, 1948. [121]

Title of District Court and Cause.]

STIPULATION INCORPORATING
MATERIAL FROM A COMPANION CASE

It Is Stipulated that the Court's order on plaintiff's motion to strike from defendants' Answer to plaintiff's Complaint filed in Woods v. Sydney Mark Taper and Harding Manor, Inc., Case No. 8451-PH, shall be applied in this case as fully as though the motion had been made and ruled upon in this case insofar as said order is applicable to the facts of this case.

It Is Further Stipulated that the reply to plaintiff's requests for admissions in Woods v. Sydney Mark Taper and Harding Manor, Inc., No. 8451-PH and all proceedings on said requests and reply hereto shall be applied to this case as fully as if said requests had been served on the defendants in this case and replied to by them insofar as said requests and reply are pertinent to this case.

It Is Further Stipulated that the Court's order on the Motion for Summary Judgment filed in the action of Woods v. Sydney Mark Taper and Harding Manor, Inc., Case No. 8451-PH, shall likewise apply to this action as fully as though the Motion for Summary Judgment had been made and ruled upon in this case insofar as said order is applicable to the facts of this case.

It Is Further Stipulated that the defendants' Affidavits and Points and Authorities in support of the Motion for Summary Judgment shall be considered as though they had been filed in this action insofar as said Motion for Summary Judgment, the Affidavits and the Points and Authorities are pertinent to this case.

Dated Los Angeles, California, this 8th day of September, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ BENJAMIN CHAPMAN,
Attorneys for Plaintiff.

ALBERT H. ALLEN and
HYMAN GOLDMAN,
By /s/ ALBERT H. ALLEN,
Attorneys for Defendants.

Good cause appearing therefor, it is so ordered.
This 10th day of September, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Sept. 10, 1948. [124]

In the District Court of the United States,
Southern District of California, Central Division

No. 8453-PH

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

SYDNEY MARK TAPER, WARDLOW AN-
NEX, INC., DOE I, DOE II and DOE III,
Defendants.

COMPLAINT FOR PRELIMINARY AND
FINAL INJUNCTION AND FOR OTHER
RELIEF

I.

Plaintiff, as Housing Expediter, Office of the
Housing Expediter, brings this action for an in-
junction and other appropriate relief pursuant to
Section 206 of the Housing and Rent Act of 1947
as amended, for the purpose of enjoining the
defendants from evicting from the hereinafter
described housing accommodations the hereinafter
described persons.

II.

Jurisdiction is conferred on this Court by Section
206 of the Housing and Rent Act of 1947 as
amended.

III.

The defendant Wardlow Annex, Inc., is a cor-
poration duly organized and existing under the
laws of the State of California.

IV.

At all times hereinafter mentioned defendants were the landlords of [125] the housing accommodations located at 3733 Easy Avenue, Long Beach, California.

V.

At all times hereinafter mentioned there was in effect in the Los Angeles Defense Rental Area a Controlled Housing Rent Regulation (12 F. R. 4331).

VI.

At all times hereinafter mentioned the housing accommodations hereinafter described were subject to said aforementioned Act and Regulation and particularly Section 209 of said Act.

VII.

That the defendants, Doe I, Doe II and Doe III, are fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

VIII.

That the defendants are residents within the County of Los Angeles, State of California, have their principal place of business within said County, and are within the jurisdiction of this Court.

IX.

That on or about June 3, 1948 the defendants, as landlords, commenced proceedings to evict from the housing accommodations at 3733 Easy Avenue, Long Beach, California, one, Max Ravnitzky, a tenant thereof and other persons lawfully in occupancy thereof by serving upon the said Max Ravnitzky a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such. That the defendants commenced such proceedings and served such notice for the expressly avowed purpose of making said housing accommodations vacant in order that the same might be sold to persons who would purchase such housing accommodations [126] for use as their residences.

X.

That defendants are engaged in evicting tenants from other properties of which they are the landlords, individually and under the guise of corporate structure, by serving notices to quit similar to the notice described in Paragraph IX of this complaint and with the same express avowed purpose alleged in said Paragraph IX, of which four such instances are known to plaintiff.

XI.

That said acts hereinabove alleged are in violation of the provisions of the Housing and Rent

Act of 1947 as amended, that unless defendants are restrained from further acts in furtherance of their design set forth above, they will evict said tenant and said defendant Sydney Mark Taper, and Wardlow Heights, Inc., and Harding Manor, Inc., of which he is president and a major stockholder, will proceed to evict numerous tenants in numerous housing accommodations under similar circumstances and for similar purposes as hereinabove set forth.

Wherefore, the plaintiff demands:

A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from:

1. Evicting said Max Ravnitzky and other persons now in occupancy at the premises at 3733 Easy Avenue, Long Beach, California, from said premises.

2. Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

3. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other

essential services and utilities, or threatening [127] to do any of the foregoing.

4. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

5. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded, by accepting, demanding, or receiving, in any form or manner, rents higher than the established maximum rent prescribed therein.

Dated: Los Angeles, California, this 20 day of July, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN
FRANK L. HIRST,
RICHARD G. SOLOF,

By: /s/ CASSEL JACOBS,
Attorneys for Plaintiff.

State of California, County of Los Angeles,
United States of America—ss.

Ruth Rauh, being first duly sworn, deposes and says:

That plaintiff is absent from the County of Los Angeles; that the undersigned is an employee of the United States Government, and during the time specified in the complaint, as hereinabove set forth, she was employed as a Compliance Negotiator for the Office of the Housing Expediter, an agency of the United States Government; that in the course of her duty as a Compliance Negotiator for the Office of the Housing Expediter she made an in-

vestigation of and became familiar with the facts involved in the above mentioned action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that she believes it to be true.

/s/ RUTH RAUH.

Subscribed and sworn to before me this 19th day of July, 1948.

(Seal)

/s/ H. C. ZECH,

Notary Public, in and for said
County and State.

My Commision expires October 26, 1951.

[Endorsed]: Filed July 20, 1948.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

AFFIDAVIT OF CHARLES H. BLAYLOCK

State of California,
County of Los Angeles—ss.

I, Charles H. Blaylock, having been first duly sworn, depose and say, as follows:

That I am Associate Area Rent Director for the Los Angeles Defense Rental Area, Office of the Housing Expediter, in charge of the operations of the Los Angeles Defense Rental Area Office at Long Beach, California. That I am familiar with the records of the Los Angeles Defense Rental Area

Office relating to the housing accommodations located at the following address: 3733 Easy Avenue, Long Beach, California.

That said records of the Area Rent Office relating to said housing accommodations show that said housing accommodations are controlled housing accommodations and that they are subject to the provisions of the Rent Regulation for Controlled Housing. Mr. Sydney Mark Taper and corporations with which [131] he is associated are the landlords of numerous housing accommodations in the Long Beach, Area.

Dated: July 7th, 1948.

/s/ CHARLES H. BLAYLOCK.

Subscribed and sworn to before me this 7th day of July, 1948.

(Seal)

CORA A. KIRCHNER,

Notary Public in and for the above County and State.

My Commission expires 11-11-51. [132]

AFFIDAVIT OF RUTH RAUH

State of California,
County of Los Angeles—ss.

I, Ruth Rauh, having been first duly sworn, depose and say, as follows:

That I am an employee of the Los Angeles Defense Rental Area Office, Office of the Housing Expediter, and my duties relate to housing accommodations in the Long Beach, California, Area. That as such employee I interviewed Mr. Harold C.

Frerks, Attorney for Sydney Mark Taper, President of Wardlow Heights, Inc., Harding Manor, Inc. and Wardlow Annex, Inc. That Mr. Frerks, as attorney for Mr. Taper, signed the following statement which is on file in the records of the Los Angeles Defense Rental Area Office at Long Beach, California:

“I believe that the O.H.E. opinion as to this section relates to where a certain purchaser or sale is involved, and not as to where a landlord intends to get possession [133] so that he can redecorate or add a room to the place for any future sale to parties unknown, who will occupy the place for themselves and not for rental purposes. H. C. Frerks.”

That the above statement of Mr. Frerks was made in connection with a notice to quit, served by Harding Manor, Inc. on Alvin L. Fite, et al, respecting the premises at 2538 Gale Avenue, Long Beach, California, and concerning an eviction notice served by Wardlow Annex, Inc., by S. M. Taper, on Max Ravnitzky, et al, relating to the premises at 3733 Easy Avenue, Long Beach, California.

That the statement had reference to housing and to Memorandum No. 51 issued by B. W. Diggle, Deputy Housing Expediter, Rent Operations, and Robert A. Sauer, Assistant General Counsel, Regulations and Appeals Branch, Office of the Housing Expediter, Washington, D. C., which states, in part, as follows:

“To Secure Vacant Possession for Purposes of Sale.

“Section 209(a)(5) permits eviction where ‘the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market***’. Since this is only one of several grounds for eviction under the Act, it is clear that it was not intended that this section should broaden or defeat the purpose of limitations placed in the other grounds. It follows, therefore, that since Section 209(a)(3) provides for eviction where ‘the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser; Section 209(a)(5) may not be used in cases where sales are involved. That is to say, since a tenant may be evicted for occupancy by a purchaser under Section 209(a)(3), a landlord may not evict under Section 209(a)(5) for the purpose of [134] obtaining vacant possession in order to sell.

“Section 206(b) of the Act authorizes the Housing Expediter to seek injunction against violations of the eviction provisions and consequently, any violations of the eviction restriction referred to above may be referred to Litigation for appropriate action.”

Mr. Frerks further stated to me, at the time he signed the above statement on June 11, 1948, at the Long Beach Office of the Housing Expediter, 110 East Anaheim Street, Long Beach, California, that the above premises are to be repaired and gen-

erally remodeled and eventually sold to prospective purchasers, that it is the intention to take the cases into court for the Court's decision on eviction. I advised Mr. Frerks that the reason stated in the notice to quit would seem to be in violation of Section 209(a)(5) of the Housing and Rent Act of 1947 as amended, in that it does involve a sale of the housing accommodations.

It is my impression, as a result of my conversation with Mr. Frerks that his clients named above are about to commence eviction proceedings in numerous instances.

Dated: July 7, 1948.

/s/ RUTH RAUH.

Subscribed and sworn to before me this 7th day of July, 1948.

(Seal)

CORA A. KIRCHNER,

Notary Public, in and for the
above County and State.

My Commission expires 11-11-51. [135]

AFFIDAVIT OF MAX RAVNITZKY

State of California,

County of Los Angeles—ss.

I, Max Ravnitzky, having been first duly sworn, depose and say as follows:

That on or about June 3, 1948 Wardlow Annex, Inc., by S. M. Taper, President, as landlord of the premises wherein I reside at 3733 Easy Avenue, Long Beach, California, served me with a written

notice to quit said premises at the expiration of sixty days after service of the notice.

Dated July 3rd, 1948.

/s/ MAX RAVNITZKY.

Subscribed and sworn to before me this 3rd day of July, 1948.

(Seal)

/s/ HAZEL TECK,

Notary Public, in and for the
above County and State.

My Commission expires 12/31/49.

[Endorsed]: Filed July 20, 1948. [136]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified complaint, memorandum of points and authorities and affidavits filed by plaintiff, and good cause appearing therefor:

It is hereby ordered that defendants Sydney Mark Taper and Wardlow Annex, Inc. appear before this Court in Courtroom Number 3 on the second floor of the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 26th day of July, 1948, at 10:00 o'clock A. M. in the forenoon, or as soon thereafter as the matter can be heard, and show cause, if any there be, why this Court, pending trial of this action, should not grant a preliminary injunction restraining the defendants, their agents, servants and employees and all persons in active concert or participation with them according to the prayer of the complaint.

It is further ordered that a copy of the affidavits and points and authorities filed by the plaintiff and a copy of this order be served with the [137] summons and complaint herein upon defendants Sydney Mark Taper and Wardlow Annex, Inc. not later than the 22nd day of July, 1948.

Dated: Los Angeles, California, this 20th day of July, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed July 20, 1948. [138]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff having filed his verified complaint and his affidavits and memorandum of points and authorities in support of his motion for preliminary injunction and the defendants Sydney Mark Taper, and Wardlow Annex Inc. through its President, Sydney Mark Taper, each having been personally served with a copy of the verified complaint, a copy of the order to show cause, a copy of the memorandum of points and authorities and affidavits in support of plaintiff's motion for preliminary injunction on the 22nd day of July, 1948, and the cause having come on regularly for hearing on the 26th day of July, 1948, before the Honorable Peirson M. Hall, Judge Presiding, and the plaintiff being represented by Frank L. Hirst, Esq. and

said defendants not appearing in person or by counsel, and said cause having been continued by order of the Court for hearing to the 27th day of July, 1948 at 10:00 o'clock A. M., at which time the cause was submitted on plaintiff's verified complaint, affidavits and memorandum of points and authorities in support of his motion [139] for preliminary injunction, no evidence having been offered in opposition to plaintiff's motion by said defendants, and no affidavits having been filed by them in opposition to said motion, and the Court having considered all of the allegations in said verified complaint and said affidavits, the said allegations being unopposed and the Court being fully apprised of the premises, makes the following findings of fact:

FINDINGS OF FACT

1. That the plaintiff as Housing Expediter, Office of the Housing Expediter, brings this action for an injunction and makes his motion for a preliminary injunction pursuant to Section 206 of the Housing and Rent Act of 1947 as amended, for the purpose of enjoining the defendants from existing from the hereinafter described housing accommodations the hereinafter described persons.
2. That jurisdiction of this action is conferred on this Court by Section 206 of the Housing and Rent Act of 1947 as amended.
3. That the defendant Wardlow Annex Inc. is a corporation, duly authorized and existing under the laws of the State of California.

4. That at all times hereinafter mentioned the defendants were the landlords of the housing accommodations located at 3733 Easy Avenue, Long Beach, California.

5. That at all times pertinent hereto there was in effect in the Los Angeles Defense Rental Area a controlled Housing Rent Regulation (12 F. R. 4331).

6. That at all times pertinent hereto the housing accommodations hereinabove described were subject to said aforementioned Act and Regulation, particularly Section 209 of said Act.

7. That the defendants Sydney Mark Taper and Wardlow Annex Inc. are residents within the County of Los Angeles, State of California, having their principal place of business within said county and are within the jurisdiction of this Court.

8. That on or about June 3, 1948 said defendants, as landlords, commenced proceedings to evict from the housing accommodations at 3733 Easy Avenue, Long Beach, California, one, Max Ravnitzky, a tenant thereof, and other persons [140] lawfully in occupancy thereof by serving upon the said Max Ravnitzky a Notice to Quit, basing said notice expressly on the landlord's desire in good faith to recover possession of said housing accommodations for the immediate purpose of withdrawing said housing accommodations from the rental market and such housing accommodations are not thereafter to be offered for rent as such.

9. That said defendants commenced such proceedings and served such notice for the expressly avowed purpose of making said housing accommodations vacant in order that the same might be re-decorated and thereafter sold to persons who would purchase such housing accommodations for use as their residences.

10. That said defendants are engaged in evicting tenants from other housing accommodations subject to said Act and said Regulation of which they are the landlords individually and under the guise of corporate structure by serving notices to quit similar to the notice to quit hereinabove described and with the same expressly avowed purpose as hereinabove set forth.

11. That unless defendants are restrained from further acts in furtherance of their design set forth above they will evict said tenant and said Sydney Mark Taper and Wardlow Annex Inc., of which said Sydney Mark Taper is President and a major stockholder, will proceed to evict numerous other tenants in numerous other controlled housing accommodations owned, controlled or managed by said defendants, under similar circumstances and for the same purpose as hereinabove set forth.

From the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. That the purpose for which said defendant Sydney Mark Taper and Wardlow Annex Inc. have commenced said eviction proceedings and served

said notices to quit on said Max Ravnitzky and said other tenants hereinabove referred to does not constitute a proper ground for eviction within the meaning of Section 209(a)(5) of said Housing and Rent Act of 1947 as amended nor any other subdivision of said Section 209.

2. That the plaintiff herein is entitled to a preliminary injunction, pending the determination of the Court on plaintiff's complaint for a permanent [141] injunction, enjoining the defendants Sydney Mark Taper and Wardlow Annex Inc., their agents, servants, employees, attorneys, officers and directors, and all other persons in active concert or participation with them from:

(a) Evicting Max Ravnitzky and all other persons in occupancy of the housing accommodations located at 3733 Easy Avenue, Long Beach, California, except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947 as amended and on the grounds and for the purposes stated therein.

(b) Engaging in any action or course of action the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

(c) Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

Dated: Los Angeles, California, this 27th day of July, 1948.

/s/ PEIRSON M. HALL,
Judge.

Presented by:

ABE I. LEVY, STEPHEN D. MONAHAN,
FRANK L. HIRST, RICHARD G.
SOLOF,

By: /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

[Endorsed]: Filed July 27, 1948. [142]

[Title of District Court and Cause.]

DECREE FOR PRELIMINARY INJUNCTION

This cause came on regularly for hearing on the motion of the plaintiff for a preliminary injunction on July 28, 1948 before the Honorable Peirson M. Hall, Judge Presiding, and was continued for hearing to July 27, 1948 at 10:00 o'clock A. M. Plaintiff was represented by Frank L. Hirst, Esq., and defendants Sydney Mark Taper and Wardlow Annex Inc. were not present and not represented by counsel. The Court having considered plaintiff's verified

complaint and affidavits and memorandum of point and authorities in support of plaintiff's motion for a preliminary injunction, said defendants not having submitted either affidavits or other evidence, and the Court having this day made its written finding of fact and conclusions of law, and being fully advised in the premises, now therefor,

It is ordered, adjudged and decreed that the defendants Sydney Mark Taper and Wardlow Anne Inc., their agents, servants, employees, attorneys officers and directors and all other persons in active concert or [143] participation with them are hereby enjoined and restrained until further order of the Court herein from:

1. Evicting Max Ravnitzky and all other person in occupancy of the housing accommodations located at 3733 Easy Avenue, Long Beach, California except in accordance with the provisions of Section 209 of the Housing and Rent Act of 1947 as amended and on the grounds and for the purpose stated therein.

2. Engaging in any action or course of action the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

3. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent or from discontinuing, withholding, suspending, or

shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

Dated: Los Angeles, California, this 27th day of July, 1948. 4:55 P. M.

/s/ PEIRSON M. HALL,
Judge.

Presented by:

ABE I. LEVY

STEPHEN D. MONAHAN

FRANK L. HIRST

RICHARD G. SOLOF

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

Judgment entered July 28, 1948. Docketed July 28, 1948, Book 52, Page 275.

[Endorsed]: Filed July 27, 1948. [144]

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Sydney Mark Taper, Harding Manor, Inc., a corporation, Wardlow Annex, Inc., a corporation, and Wardlow Heights, Inc., a corporation, and answering the complaint of the plaintiff on file herein admit, deny and allege as follows:

I.

Answering Paragraph V, these defendants admit that at all times mentioned in the complaint there was in effect the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, and admit that the property of the defendants is in the Los Angeles Defense Rental Area which is a controlled housing rent area, and that there was in effect in the Los Angeles Defense Rental Area controlled housing rent regulation (12 F. R. 4331).

II.

Answering Paragraph IX, these defendants admit that on or about, to-wit, the third day of June 1948, the defendant, Wardlow Annex, Inc., a corporation, as landlord, commenced proceedings to evict from the housing accommodations at 373 Easy Avenue, Long Beach, California, Max Ravnitzky, a tenant thereof, and that there was served upon said Max Ravnitzky a notice to quit, which said notice set forth that the landlord desired in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and that such housing accommodations would not thereafter be offered for rent as such. Admits that the defendant commenced the proceedings and served the notice and admits that the purpose of such notice was for the purpose of evicting the said Max Ravnitzky, but denies that there was any bad faith or other ulterior motives on the part of the said landlord and defendant.

Wardlow Annex, Inc.; denies each and every other allegation in said paragraph contained.

III.

Answering Paragraphs X and XI, these defendants deny that said acts hereinbefore referred to and as set forth in the plaintiff's complaint are in violation of the provisions of the Housing and Rent Act of 1947, as amended; on the contrary, allege that said acts are within the provisions of the regulations; deny each and every other allegation in said paragraph contained.

For a first separate and affirmative defense, these defendants set forth:

I.

That the defendants are the owners of the real [146] property described in the plaintiff's complaint and that said properties have been leased to the persons mentioned in said complaint since the early part of 1945, that the property at 3733 Easy Avenue was leased to Max Ravnitzky on or about the 15th day of January, 1945 at a rental of Fifty Dollars (\$50.00) per month, which at that time was in accordance with the O.P.A. ceiling price fixed for said property.

II.

That at the time said premises were leased to Max Ravnitzky, the said Max Ravnitzky agreed to maintain the property in good order, to keep the lawns watered and to keep the premises in a clean and healthy condition.

III.

Defendants allege that the property occupied by said Max Ravnitzky was so maintained by the said Max Ravnitzky so as to be dirty, filthy and in a complete state of disrepair; that the said Max Ravnitzky permitted windows to be broken, hardwood floors to be marred and scratched with the floors being worn; that the linoleum was torn from the floor; that the window shades were broken and torn; that the premises were so misused so as to have marks on all the plaster walls; that the windows were jarred loose from the frames; that the toilet seat was broken; that the woodwork was scratched; that the lawns were unwatered and dry to the point of needing replacement; that said Max Ravnitzky permitted the back yard to be littered with debris so as to need a complete replanting; that the screens were broken and torn; that the tile was chipped and broken; that said property was so badly abused as to cause the same to depreciate in value and become unmerchantable and unsalable.

IV.

That in addition thereto, the said house was leased to said Ravnitzky in January of 1945 at a rental of Fifty Dollars (\$50.00) per month and that since said date the cost of maintaining said property has so increased as to cause the defendants to sustain a loss as a result of its rental at said figure. That the said house has a value of approximately Nine Thousand Dollars (\$9,000.00) and that the follow-

ng costs and expenditures are necessary in connection with the operation of said property, to-wit:

Taxes: \$110.00 per year.

Interest to the Bank of America under FHA Insured loan, including $\frac{1}{2}\%$ FHA insurance \$215.00 per year.

Fire Insurance: \$12.00 per year.

Depreciation at 4% per year \$294.00 per year.

Repairs consisting of redecorating or repairing the outside (on a basis of once every three years) at an average cost of \$86.00 or a cost of: \$28.66 per year.

Replacement of screen at a cost of \$11.00 per year.

Repairs to plumbing, windows and miscellaneous repairs on an average of \$13.00 per year.

Total Cost of maintenance of said property \$708.00 per year or a net cost of approximately Fifty-nine Dollars (\$59.00) per month, exclusive of any return to the defendants on their investment and exclusive of any major repairs such as the replacement of the roof, replacement of lawns, replacement of worn-out plumbing or tile, replacement of water heaters, replacement of heating system or other usual and customary replacements which have to be [148] made over a period of years, exclusive of interior decoration.

V.

Defendants further set forth that the payment which the said Max Ravnitzky was making to the defendants were in the sum of Fifty Dollars (\$50.00) per month or Six Hundred Dollars (\$600.00) per year and that the defendants were sustaining a loss of Nine Dollars (\$9.00) per month or One Hundred Eight Dollars (\$108.00) per year without taking into account any consideration for a return on the capital investment of the defendants, without allowing for the collection of rent without allowance for the office overhead and supervisory duties of the defendants and their employees without allowances for accounting fees and the various and sundry other charges usually entailed in the handling and rental of property.

VI.

Defendants further set forth that upon it appearing that the defendants were sustaining a loss as set forth in the preceding paragraphs, they made application with the Office of Housing Expediter Ben C. Koepke, and that after expending several hundred dollars for obtaining the necessary information including the time of the agents and representatives of the defendants in gathering information requested by the Housing Expediter, the Housing Expediter allowed a rent increase of One and twenty-five/one-hundredths Dollars (\$1.25) per month or a total of Fifteen Dollars (\$15.00) per year, so that notwithstanding the increase in rent of One and twenty-five/one-hundredths Dollars (\$1.25) per month, the defendants were still sustain-

ing a loss of Ninety-three Dollars (\$93.00) per year and this without allowing anything to the defendants for office overhead, collection of rents, or any return on the investment of the defendants, nor for the replacement costs of damages to the property if the same was maintained for any period of time; that notwithstanding such increase [149] defendants were sustaining a loss of Two Hundred Twenty-five Dollars (\$225.00) per year on said house.

VII.

That thereupon, the defendants elected to remove said property from the housing market and to have said property placed in such condition as an expenditure of several hundred dollars so as to be in a position to sell said property, and that the only purpose of reaching the conclusion to sell said property was by reason of the fact that the defendants could not obtain the necessary relief which would prevent them from taking the losses which they were sustaining from the rental of said property.

VIII.

That if said properties were not disposed of at the present time, not only would the defendants be taking a loss on their property during the time it was occupied, but that the market value of said property which is now fixed at the sum of approximately Nine Thousand Dollars (\$9,000.00) may in the future drop and that in such event, the defendants would not be able to dispose of the property

at its present value; that likewise at a later date, the property may depreciate so that even at a rental of Fifty Dollars (\$50.00) per month they would then sustain great losses, whereas if the defendants were now permitted to dispose of said property they could do so without a loss and recover their investment.

For a second separate and affirmative defense, these defendants allege:

I.

Defendants adopt and reallege all of their allegations of the First Affirmative Defense and make the same a part hereof, as though the same were fully set forth as length herein.

II.

That under the Housing Act as hereinbefore referred to, [150] the defendants had the right to remove said property from the rental market and that in that connection they set forth that Title II of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, Section 209A, Subdivision 5, provides that: "The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing the housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such."

III.

Defendants set forth that they do intend to recover the possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and the defendants represent that the said housing accommodations will not be offered for rent as such and that the defendants will not rent said housing accommodations but will remove them from the rental market; that the defendants have the right to remove said housing accommodations from the rental market and have a right to evict any tenant occupying said premises for such purposes.

Wherefore, defendants pray that they have judgment and that the preliminary injunction heretofore issued be dissolved and that the action as to the property concerning Max Ravnitzky be dismissed; that the court decree that the defendants have the right to evict tenants in possession for the purpose of removing said housing accommodations from the rental market upon condition that the defendants do not offer said property for rent.

ALBERT H. ALLEN &
HYMAN GOLDMAN

By /s/ ALBERT H. ALLEN
Attorneys for Defendants.

(Acknowledgment of service attached.)

[Endorsed]: Filed August 10, 1948. [151]

[Title of District Court and Cause.]

STIPULATION INCORPORATING MA-
TERIAL FROM COMPANION
CASE

It is stipulated that the Court's order on plaintiff's motion to strike from defendants' Answer to plaintiff's Complaint filed in Woods v. Sydney Mark Taper and Harding Manor Inc., Case No. 8451-PH, shall be applied in this case as fully as though the motion had been made and ruled upon in this case insofar as said order is applicable to the facts of this case.

It is further stipulated that the reply to plaintiff's request for admission in Woods v. Sydney Mark Taper and Harding Manor Inc., No. 8451-PH, and all proceedings on said requests and reply, thereto shall be applied to this case as fully as if said requests had been served on the defendants in this case and replied to by them insofar as said requests and reply are pertinent to this case.

It is further stipulated that the Court's order on the [153] Motion for Summary Judgment filed in the action of Woods v. Sydney Mark Taper and Harding Manor, Inc., Case No. 8451-PH, shall likewise apply to this action as fully as though the Motion for Summary Judgment had been made and ruled upon in this case insofar as said order is applicable to the facts of this case.

It is further stipulated that the defendants' Affidavits and Points and Authorities in support of

the Motion for Summary Judgment shall be considered as though they had been filed in this action insofar as said Motion for Summary Judgment, the Affidavits and the Points and Authorities are pertinent to this case.

Dated: Los Angeles, California, this 8th day of September, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By: /s/ BENJAMIN J. CHAPMAN,
Attorneys for Plaintiff.

ALBERT H. ALLEN AND
HYMAN GOLDMAN

By: /s/ ALBERT H. ALLEN,
Attorneys for Defendants.

Good Cause appearing therefore, it is so ordered.
This 10th day of September, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed September 10, 1948. [154]

[Title of District Court and Cause.]

AFFIDAVITS OF HETTYLEIGH CATLETT

Plaintiff herewith files the Affidavit of Hettyleigh Catlett respecting the property at 2538 Gale Avenue, Long Beach, California.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
BENJAMIN CHAPMAN,

By /s/ BENJAMIN CHAPMAN,
Attorneys for Plaintiff.

(Acknowledgment of Service.) [161]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Hettyleigh Catlett, being first duly sworn, deposes and says:

That her name is Hettyleigh Catlett, and that she resides at 1609 Chestnut Avenue, Long Beach 13, California;

That she has been continuously employed since August 1, 1944 and presently so employed, as a Rent Inspector for the Office of the Housing Expediter and its predecessors: Office of Temporary Control, Office of Rent Controls; and the Office of Price Administration, Rent Division.

That during her employment, her Official Station has been and is now the Long Beach Branch Office.

That on September 21, 1948, Affiant personally inspected those certain housing accommodations known as 2538 Gale Avenue, Long Beach, California, which were then occupied by Mr. and Mrs. J. E. Wampler.

That Mrs. J. E. Wampler was personally interviewed and Mrs. Wampler stated that she and her husband had purchased the dwelling from Biltmore Homes Corporation, the former owner, and moved into the premises on or about August 15, 1948. Mrs. Wampler stated that there was no written agreement executed between the seller, Biltmore Homes, S. M. Taper, et al, wherein Mr. and Mrs. Wampler had agreed not to re-rent the premises at any future time nor during the time when the Housing and Rent Act and Regulations issued pursuant thereto for controlled housing accommodations would affect the rental of said property.

Further Mrs. Wampler stated that there had not been any substantial remodeling or alterations made since the former tenants, Mr. and Mrs. Alvin Fite and family, had vacated the premises, but that after purchasing the property, Mr. and Mrs. Wampler painted the interior of the dwelling.

Mrs. Wampler stated that the sink, lavatory and toilet were cracked when they took possession of the property but that these repairs were not made by the seller nor the sale of the premises conditioned upon the seller making these repairs.

Further that no repairs of any nature whatever had been made by the seller between the time that the former tenants vacated the premises and the

date upon which they were occupied by Mr. and Mrs. Wampler. [162]

Further, that an inspection of the premises by the Affiant did not disclose that any damage had been done to the premises by the former tenant occupants which would require repairs before occupancy by the present owners, normal wear, tear and use excepted.

Affiant further states that on September 21, 1948, Mrs. Fite who formerly occupied the premises at 2538 Gale Avenue, Long Beach, California, with her husband, Mr. Fite, was interviewed in her home at 867 33rd Street, Long Beach, California.

Mrs. Fite stated to the Affiant that she and her husband vacated the premises at 2538 Gale Avenue, Long Beach, California, on July 7, 1948, as a result of a sixty day eviction notice served on Mrs. Fite and her husband by the former owners, Biltmore Homes Corporation, S. M. Taper, et al, which provided for the removal of certain housing accommodations from the rental market and that she understood that the housing accommodations were to be offered for sale.

Mrs. Fite further stated on or about two weeks prior to the date that the eviction notice was served on her and her husband at 2538 Gale Avenue, Long Beach, California, a representative from the then owners, Biltmore Homes, called at said premises for the purpose of inspection and stated at that time to Mrs. Fite, that the dwelling was in very good condition.

Mrs. Fite further stated that by reason of the fact that said notice to quit was served upon herself and husband, they were obliged to purchase property for housing accommodations at 867 33rd Street, Long Beach, California.

/s/ HETTYLEIGH CATLETT.

Subscribed and sworn to before me this 23rd day of September, 1948.

/s/ CORA B. KIRCHINS,

Notary Public in and for the County of Los Angeles, State of California.

(My Commission Expires 11-11-51.)

[Endorsed]: Filed September 30, 1948. [163]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Court sitting without a jury on Monday September 27, 1948, on the Motion of Albert H. Allen and Hyman Goldman, Attorneys for the defendants, for a Summary Judgment, Albert H. Allen appearing as an attorney for defendants and Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof and Benjamin Chapman, by Benjamin Chapman, appearing as attorneys for the plaintiff, and the Court having read the [169] pleadings and having examined the affidavits filed by the respective parties and having examined the Motion

for Summary Judgment filed by the defendants and the defendants having offered to withdraw the affirmative defenses set up by them in their Answers and the Court having examined the Points and Authorities in support of defendants Motion for Summary Judgment, and the plaintiffs Points and Authorities, and Affidavits in opposition thereto, and the Court having examined the admissions and the defendants having made certain offers as is hereinafter more fully set forth and the Court being fully advised in the premises, the Court finds the facts as follows:

1. That the actions entitled Tighe E. Woods, Housing Expediter, et al. vs. Sydney Mark Taper and Harding Manor, Inc., et al., Civil No. 8451-PH, and the action entitled Tighe E. Woods, Housing Expediter, et al. vs. Sydney Mark Taper, Wardlow Heights, Inc., a corporation, and Wardlow Annex, Inc., a corporation, et al., Civil No. 8452-PH, and the action entitled Tighe E. Woods, Housing Expediter, et al. vs. Sydney Mark Taper and Wardlow Annex, Inc., a corporation, Civil No. 8453-PH, were for all purposes insofar as the facts permit, consolidated for the purpose of trial and for the purposes of all hearings on the various motions before this Court, said consolidation being by way of a stipulation entered into by the plaintiffs and defendants under date of September 27, 1948;

2. That said stipulation provided that all three actions shall be consolidated into Case No. 8451-PH and treated as one case.

3. That the allegations of Paragraphs I, II, III,

IV, V, VI and VIII of the plaintiff's complaint are true.

4. That it is true that on or about June 3, 1948, the defendants, as landlord, commenced proceedings to evict from the Housing Accommodations at No. 2538 Gale Avenue, Long Beach, California, one Alvin L. Fite, a tenant thereof and other persons [170] lawfully in occupancy thereof, by serving a notice to quit, basing said notice expressly on the landlord's desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such; that likewise similar notice on similar grounds was served on Lucy A. Heustis, who is a tenant at the property at 3500 Easy Avenue, Long Beach; on Paul R. Moberly, who is a tenant at 3533 Fashion Avenue, Long Beach; on Henry Monkiewicz, who is a tenant at 3557 Fashion Avenue, Long Beach; and on Max Ravnitzky, who is a tenant at 3733 Easy Avenue, Long Beach, California.

5. That Alvin L. Fite and Henry Monkiewicz voluntarily vacated the said premises prior to any proceedings brought against them in connection with said eviction and that as to said properties this action is moot.

6. That the defendants have filed affidavits by which affidavits they allege that they seek to remove the property from the rental housing market as such and that they will not thereafter so long as

the said housing and rent act of 1947 or any amendments thereto, or any regulations thereunder remain in full force and effect, offer such housing accommodations for rent as such.

7. That the defendants have voluntarily offered that any decree of this court contain a condition or provision that said housing accommodations are to be removed from the rental market as such and that so long as the housing and rent act of 1947 or any amendment thereto and the regulations thereunder, remain in full force and effect, and prohibit said premises from being placed on the rental market as housing accommodations that the defendants will not offer said properties for rental as housing accommodations as such .

8. That the defendants have further offered to have any [171] judgment or decree contain a provision or condition that if after the said housing accommodations are removed from the rental market and if after such removal from the rental market the defendants should sell said properties, that any sale which the defendants may enter into subsequent to the property being removed from the rental market would contain a provision in such agreement of sale that the purchaser of said property would not thereafter offer to rent nor would he rent said property as housing accommodations so long as the Housing and Rent Act of 1947 or any amendment thereto and the regulations thereunder, remain in full force and effect and prohibit said property from being placed on the rental market for use as housing accommodations.

9. The Court further finds that Section 209(a) (5) of the Housing and Rent Act of 1948, 50 U.S.C.A. Appendix, dated August, 1948, Section 1899, provides for eviction on the following ground:

“The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such.”

The Court further finds that said section 209(a) (5) of the Housing and Rent Act of 1948, 50 U.S.C.A. Appendix, dated August, 1948, is applicable to the facts presented by the plaintiff's complaint, and the defendants' answer and that the defendants have a right to evict tenants from properties leased to said tenants so long as there is first served upon said tenants a sixty-day notice in writing as is required by the Housing and Rent Act of 1947, and the amendments thereto and so long as the defendants seek in good faith to remove said properties from the rental housing market as such and so long as the defendants will not thereafter offer such housing accommodations for rent as such.

10. That it is not true that the defendants sought to evict [172] tenants for the purpose of making said housing accommodations vacant but the Court finds that the purpose for which said notices were served was for the purpose of removing said housing accommodations from the rental

market as such and the court finds that after said housing accommodations are removed from the rental market the defendant has the right to deal in an with his property as he sees fit so long as he does not offer to rent said housing accommodations and so long as he does not permit the housing accommodations to be rented as such.

11. That Paragraphs X and XI of plaintiff's complaint are untrue.

12. That the allegations of Paragraphs I, II and III of the denfendants' Answers are true.

13. That the preliminary injunction granted in this action should be dissolved and that the plaintiff is not entitled to any restraining order or any other relief.

14. That the defendants are entitled to judgment and decree dissolving the preliminary injunction and a decree establishing the right of the defendants to proceed with eviction so long as they serve the necessary notice as required by law and so long as they remove the housing accommodations from the rental housing market and so long as said properties will not thereafter be offered for rent as housing accommodations so long as there remains in full force and effect the Housing and Rent Act of 1947, or any amendments thereto or any regulations thereunder which prohibit the rental of such housing accommodations as such.

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

That defendants are entitled to a judgment dissolving the preliminary injunction and a decree in their favor by which decree it shall be provided that the defendants have the right to proceed [173] with any eviction upon condition that they comply with the rules and regulations concerning evictions by serving the required sixty-day notice as is required by the Housing and Rent Act of 1947, and the amendments thereto and so long as the said housing accommodations are removed from the rental market and so long as the defendants will not offer such housing accommodations for rent and so long as the defendants withdraw such housing accommodations from the rental market and such housing accommodations are not thereafter offered for rent as such and so long as the defendant will contain in any agreement of sale that they may make or enter into after said housing accommodations are removed from the rental market as such; that such purchaser will not thereafter so long as the Housing and Rent Act of 1947, or any amendment thereto and the regulations thereunder, remain in full force and effect and which prohibit said premises from being placed on the rental market as housing accommodations, offer such housing accommodations for rent as such.

Let judgment be entered accordingly.

Dated this 5th day of October, 1948.

/s/ CHARLES C. CAVANAH,
Judge.

(Acknowledgment of Service attached.)

[Endorsed]: Filed October 13, 1948.

In the District Court of the United States Southern
District of California, Central Division

Civ. No. 8451-PH

TIGHE E. WOODS, HOUSING EXPEDITER,
OFFICE OF THE HOUSING EXPEDITER,
Plaintiff,

vs.

SYDNEY MARK TAPER, HARDING MANOR
INC., a corporation, DOE I and DOE II,
Defendants

Civ. No. 8452-PH

vs.

SYDNEY MARK TAPER, WARDLOW
HEIGHTS, INC., a corporation, WARDLOW
ANNEX, INC., a corporation, and HARDING
MANOR, INC., a corporation,
Defendants

Civ. No. 8453-PH

vs.

SYDNEY MARK TAPER, WARDLOW AN-
NEX, INC., DOE I, DOE II and DOE III,
Defendants.

DECREE

The defendants' Motion for Summary Judgment in the above-entitled consolidated action having come on regularly for hearing before the Court on the 27th day of September, 1948, Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof and Benjamin Chapman, by Benjamin Chap-

man, appearing as attorneys for the plaintiff, and Albert H. Allen and Hyman Goldman, by Albert H. Allen, [176] appearing as attorneys for the defendants, and the defendants having withdrawn their affirmative defenses set up by their Answers, and the Court having examined the pleadings, papers, records and files in the herein actions, and having examined defendants' Motion for Summary Judgment, the affidavits and Points and Authorities in support thereof, and having examined the affidavits and Points and Authorities in opposition to said Motion, and the Court having heard the argument of counsel both in support and in opposition to the said Motion, and the defendants having offered to have any judgment or decree of this Court contain a provision that if the defendants should withdraw the premises herein involved from the rental market, that they will not thereafter offer for rent said premises as housing accommodations so long as the Housing and Rent Act of 1947 or any amendment thereof and the regulations thereunder remain in full force and effect and prohibit said premises from being placed on the rental market as housing accommodations, and the defendants having represented that any agreement of sale which defendants may enter into subsequent to the property being removed from the rental market would contain a provision in such agreement of sale that the purchaser of said property would not thereafter offer to rent or rent said premises as housing accommodations, so long as the Housing and Rent Act of 1947 or any amendment thereof and the

regulations thereunder remain in full force and effect and prohibit said property from being placed on the rental market for use as housing accommodations, and the Court being fully advised in the premises and having directed that judgment be entered in accordance therewith, Now Therefore by reason of the law aforesaid:

It is Hereby Ordered, Adjudged and Decreed that the defendants' Motion for Summary Judgment be granted, that plaintiff take nothing by reason of his complaint, and that the preliminary injunction heretofore granted be and the same is hereby dissolved.

It is further ordered, adjudged and decreed by the Court [177] that the defendants, Sydney Mark Taper, Harding Manor, Inc., a corporation, Wardlow Heights, Inc., a corporation, and Wardlow Annex, Inc., a corporation, have the right to evict tenants in possession of the property described in the complaints herein, in accordance with the notice heretofore given by the defendants to said tenants, pursuant to Section 209(a)(5) of the Housing and Rent Act of 1947, as amended, on the ground that the defendants desire in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such. That as long as the Housing and Rent Act of 1947, as amended, and the regulations thereunder prohibit the properties in-

involved herein from being rented as housing accommodations, the defendants will not offer or rent said properties as housing accommodations or place said properties on the rental market as housing accommodations; and in addition, should the defendants sell any of the properties set forth in the plaintiff's complaints and now owned by the defendants, then said agreement of sale shall provide that the purchaser thereof will not place said premises on the rental market to be used as housing accommodation so long as the Housing and Rent Act of 1947, as amended, and the rent regulations thereunder prohibit said premises from being rented or offered for rent as housing accommodations.

Dated: October 13, 1948.

/s/ CHARLES C. CAVANAH,

Judge of the United States
District Court.

Approved as to form. Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof and Benjamin Chapman.

Judgment entered October 13, 1948. Docketed October 13, 1948. Book 53, Page 333.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed October 13, 1948. [178]

[Title of District Court and Cause.]

NOTICE BY CLERK OF ENTRY
OF JUDGMENT

Albert H. Allen & Hyman Goldman, Esqs., Abe I
Levy, Esq., and Benjamin Chapman, Esq.

Re: 8451-PH—Tighe E. Woods, etc. v. Sydney Mark
Taper, et al.

8452-PH—Tighe E. Woods, etc. v. Sydney Mark
Taper, et al.

8453-PH—Tighe E. Woods etc. v. Sydney Mark
Taper, et al.

You are hereby notified that Judgment has been
entered this day in the above-entitled case, in Civil
Order Book No. 53, page 333.

Dated October 13, 1948, Los Angeles, California

By /s/ EDMUND L. SMITH, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tighe E. Woods,
Housing Expediter, Office of the Housing Expe-
diter, plaintiff above named, hereby appeals to the
Circuit Court of Appeals for the Ninth Circuit
from the final judgment entered in above entitled
consolidated action on October 13, 1948 and dock-
eted in Civil Order Book No. 53, Page 333. Said
judgment is for all of the defendants and against
said plaintiff and said judgment grants the motion
of all of the defendants for [181] a summary judg-
ment. Said judgment also is that plaintiff take

nothing by the complaint and that the preliminary injunction theretofore granted be dissolved and said judgment declares the rights of the defendants. Plaintiff appeals from the entire judgment.

Dated: Los Angeles, California, this 8th day of November, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
BENJAMIN CHAPMAN,

By /s/ ABE I. LEVY,

Attorneys for Plaintiff and Appellant Office of the Housing Expediter.

[Endorsed]: Filed November 8, 1948. [182]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 185, inclusive, contain full, true and correct copies of Complaint for Preliminary and Final Injunction and for Other Relief; Affidavits in Support of Plaintiff's Motion for Preliminary Injunction; Order to Show Cause; Findings of Fact and Conclusions of Law; Decree for Preliminary Injunction; Answer; Plaintiff's Request for Admissions Pursuant to Rule 36; Answer

to Request for Admissions; Notice of Motion for Summary Judgment; Motion for Summary Judgment; Affidavit of Sydney Mark Taper; Statements and Points and Authorities in Opposition to Motion; Additional Points and Authorities; re Motion for Summary Judgment; Affidavit of Harold C. Frerks; Memorandum in Opposition to Motion for Summary Judgment; Affidavit of Alvin L. Fitts (Mrs.); Affidavits in Opposition to Defendants' Motion for Summary Judgment and Stipulation and Order all in case No. 8451-PH and Complaint for Preliminary and Final Injunction and for Other Relief; Affidavits in Support of Plaintiff's Motion for Preliminary Injunction; Order to Show Cause; Findings of Fact and Conclusions of Law; Decree for Preliminary Injunction; Answer; and Stipulation and Order Incorporating Material from Companion Case all in case No. 8452-PH and Complaint for Preliminary and Final Injunction and for Other Relief; Affidavits in Support of Plaintiff's Motion for Preliminary Injunction; Order to Show Cause; Findings of Fact and Conclusions of Law; Decree for Preliminary Injunction; Answer and Stipulation and Order Incorporating Material from Companion Case all in case No. 8453-PH and Plaintiff's Objections to Proposed Offered Judgment; Affidavits of Hettyleigh Catlett; Plaintiff's Objection to Proposed Findings of Fact and Conclusions of Law; Finding of Fact and Conclusion of Law; Decree; Notice of Entry of Judgment; Notice of Appeal and Designation of Record on Appeal all entitled in cases Nos. 8451-PH, 8452-PH

and 8453-PH which, together with copy of reporter's transcript of proceedings on September 27, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 14th day of December, A.D. 1948.

(Seal) EDMUND L. SMITH, Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12131. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Sydney Mark Taper, Harding Manor, Inc., Wardlow Heights, Inc., and Wardlow Annex, Inc., Appellees. Transcript of Record. Appeal from United States District Court for the Southern District of California, Central Division.

Filed December 16, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12131

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

SIDNEY MARK TAPER, HARDING MANOR
INC., a Corporation, DOE I and DOE II,

vs.

SYDNEY MARK TAPER, WARDLOW
HEIGHTS, INC., a Corporation, WARDLOW
ANNEX, INC., a Corporation, and HARDING
MANOR, INC., a Corporation,

vs.

SYDNEY MARK TAPER, WARDLOW ANNEX
INC., DOE I, DOE II, and DOE III,
Appellees.

STATEMENT OF POINTS ON APPEAL

For its Statement of Points on Appeal, appellant respectfully sets forth the following:

1. The Court below erred in holding that the appellees could evict tenants under Section 209(a)(5) of the Housing and Rent Act of 1947, as amended in order to make the housing accommodations vacant for purposes of sale.

2. The Court below erred in refusing to hold that Section 209(a)(5) of the Housing and Rent

Act of 1947, as amended, does not allow eviction of tenants for purposes of making accommodations more saleable, even though the decree prohibits appellees from offering to rent or renting the accommodations, and even though the decree requires an agreement of sale to provide that purchasers thereof will not place the accommodations on the rental market to be used as housing accommodations, so long as the Housing and Rent Act of 1947, as amended, prohibited the accommodations from being rented or offered for rent as such.

3. The Court below erred in granting summary judgment when the Answer, Requests for Admissions, Responses thereto, and Affidavits, established genuine issues of fact to be tried.

4. The Court below erred in refusing to grant the injunctive relief prayed for by the Complaint.

ED DUPREE,

General Counsel.

HUGO V. PRUCHA,

Assistant General Counsel.

NATHAN SIEGEL,

Special Litigation Attorney.

Office of the Housing Expediter, Office of the
General Council.

[Endorsed]: Filed January 7, 1949. Paul P.
O'Brien, Clerk.

No. 12131

**In the United States Court of Appeals
for the Ninth Circuit**

**RICHARD E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

**SYDNEY MARK TAPER, HARDING MANOR, INC., WARDLOW
HEIGHTS, INC., AND WARDLOW ANNEX, INC., AP-
PELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

APPELLANT'S BRIEF

ED DUPREE,

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Special Litigation Attorney,

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FILED

APR 13 1949

PAUL P. O'BRIEN,

CLERK



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In the United States Court of Appeals for the Ninth Circuit

No. 12131

WIGGIE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT

v.

SYDNEY MARK TAPER, HARDING MANOR, INC., WARDLOW
HEIGHTS, INC., AND WARDLOW ANNEX, INC., AP-
PELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Housing Expediter appeals from an order denying his application for a permanent injunction in an action brought pursuant to Section 206 (b) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. Sec. 1896 (b)), to restrain the eviction of tenants from appellees' housing accommodations. Final judgment in favor of the appellees was entered on October 13, 1948 (R. 129-139). Notice of appeal was filed on November 8, 1948 (R. 141). Jurisdiction of the District Court was invoked under Section 206 of the Act, and jurisdiction of this Court under Section 1291 of the Judiciary and Judicial Procedure Act (28 U. S. C. 1291).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and regulations appear in the Appendix.

STATEMENT OF THE FACTS

In the Court below, this case turned upon the interpretation to be placed upon Section 209 (a) (5) of the Housing and Rent Act of 1947, as amended, which provides for eviction of a tenant where the landlord seeks in good faith to recover possession for the immediate purpose of withdrawing the housing accommodations from the rental market, and which "shall not thereafter be offered for rent as such." The first question is whether the Court below was right in holding that a landlord may resort to Section 209 (a) (5) of the Act in order to evict a tenant for purposes of making the accommodations more salable, or for selling them, provided the landlord's agreement of sale prohibits the purchaser from renting the accommodations.

Another question is whether the eviction provisions of the Act of 1947, as amended in 1949, and regulations issued thereunder, now control the disposition of this case. The third question is whether the Court below erred in holding that there were no genuine issues of fact to be tried, and in granting summary judgment in this case.

As the Act stood prior to amendment in 1949, evictions were forbidden so long as the tenant paid his lawful rent (Sec. 209 (a), *infra*, p. 54). Exception

the general rule were contained in six carefully
 fined paragraphs to Section 209 (a).¹

Paragraphs (3) and (5), which are of controlling
 significance here, provided that no action to recover
 possession shall be maintainable unless:

(3) the landlord has in good faith contracted
 in writing to sell the housing accommodations
 to a purchaser for the immediate and personal
 use and occupancy as housing accommodations
 by such purchaser;

* * * * *

(5) the landlord seeks in good faith to re-
 cover possession of such housing accommoda-
 tions for the immediate purpose of withdraw-
 ing such housing accommodations from the
 rental market, and such housing accommoda-
 tions shall not thereafter be offered for rent as
 such * * * .”

Eviction is authorized (1) where the tenant is committing a
 nuisance (Sec. 209 (a) (1), *infra*, p. 54); (2) where the landlord
 rents the accommodations for himself or where he seeks to sell to
 a cooperative whose membership constitutes not less than 65% of
 the existing tenants (Sec. 209 (a) (2), *infra*, p. 54); (3) where the
 landlord has in good faith contracted in writing to sell to a pur-
 chaser who desires the accommodations for self-occupancy (Sec.
 209 (a) (3), *infra*, p. 55); (4) where substantial conversion or re-
 modeling is desired which could not be done with the tenant in
 possession (Sec. 209 (a) (4), *infra*, p. 55); (5) where the landlord
 seeks to withdraw his accommodations from the rental market
 (Sec. 209 (a) (5), *infra*, p. 56); and (6) where the housing ac-
 commodations have been acquired by a state or political subdivi-
 sion for the purpose of making a public improvement and are
 needed temporarily pending the construction of such improvement
 (Sec. 209 (a) (6), *infra*, p. 56).

Violation of Section 209 (a) is forbidden by Section 206 (a) of the Act, and Section 206 (b) empowers the Housing Expediter to seek injunctive relief against all such violations in any federal, state, or territorial court of competent jurisdiction (*infra*, p. 53).

Appellees are the owners of housing accommodations located in Long Beach, California, and, as such, are subject to the provisions of the Act (R. 3). On July 20, 1948, the Housing Expediter brought three separate actions pursuant to Section 206 of the Act against appellees to restrain them from prosecuting in the state courts of California, eviction proceedings against four tenants living in their housing accommodations, on the ground that these proceedings were a violation of Section 206 of the Act (R. 2, 52, 97). These actions, which were docketed in the Court below as Nos. 8451-PH, 8452-PH and 8453-PH, were consolidated for trial by stipulation into Case No. 8451-PH, and for purposes of this appeal, are to be treated as one case (R. 50-51).

The facts are these. On or about June 3, 1948, the appellees commenced proceedings to evict from the housing accommodations located in Long Beach, California, four tenants (R. 131). These tenants were Lucy A. Heustis, a tenant at the property at 3557 Easy Avenue, Long Beach; Paul R. Moberly, a tenant at 3533 Fashion Avenue, Long Beach; Henry Monkiewicz, a tenant at 3557 Fashion Avenue, Long Beach; and Max Ravnitzky, a tenant at 3733 Easy Avenue, Long Beach, California. The appellees commenced these proceedings by serving notices to quit on each

nant. Each notice to quit provided as follows (R. 47):

This notice is given and served upon you in accordance with the law of California, and with the Housing and Rent Act of 1948, wherein it is provided that eviction is authorized in that the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such.

Investigation of the Housing Expediter disclosed that the appellees were seeking to evict the above-named tenants for the purpose of making the housing accommodations more salable, or for selling them (R. 62, 103, 106). Acting on the ground that Section 9 (a) (5) of the Act did not permit the eviction of tenants for these purposes, these suits were instituted under Section 206 of the Act for injunctive relief (R. 2, 52, 97). Almost simultaneously, an application was made for a preliminary injunction pending the outcome of the case upon the trial on the merits (R. 7-12, 58-60, 102-106). The Expediter's application for a preliminary injunction was granted by Judge Peirson M. Hall on July 27, 1948 (R. 108). In order for preliminary injunctive relief, Judge Hall found that the defendants had commenced the eviction proceedings for the avowed purpose of making the housing accommodations vacant "in order that same might be redecorated and thereafter sold to persons who would purchase such housing accommo-

dations for use as their residences" (Finding of Fact 9, R. 12, 111; Finding of Fact 11, R. 69). This finding was in accord with defendants' answer that they sought to evict the tenants "so as to be in a position to sell said property" (Par. VII of Answer, R. 26-93, 121), and was also in accord with a statement that effect signed by the attorney for the appellants and filed with the Defense-Rental Area Office (R. 60, 104). Judge Hall concluded as a matter of law that the purpose for which the appellees commenced the eviction proceedings and served the notices to quit the premises, did not constitute a proper ground for eviction within the meaning of Section 209 (a) (1) of the Act (Conclusion of Law 1, R. 16, 111-113). Accordingly, Judge Hall entered a preliminary injunction in each case restraining the appellees from evicting tenants except in accordance with the provisions of Section 209 of the Act (R. 19, 73, 114).

After filing answers in each suit, in which the charges of violation were denied (R. 21, 75, 114), the appellees moved for summary judgment on the ground that the complaints set forth no cause of action (R. 43). The matter then came on for hearing before Judge Cavanah. After hearing and a consideration of all of the pleadings, affidavits, authorities, and admissions, the Court granted appellees' motion for summary judgment (R. 129), and entered findings of fact and conclusions of law (R. 129-135).

The Court below found, among other things, that the appellees have filed affidavits alleging that they seek to remove the property from the rental market as such, and that they will not thereafter, so long

ne Act is in effect, offer such housing accommodations for rent as such (Finding of Fact 6, R. 131-132); that the appellees have offered that any decree of the Court contain a condition or provision that so long as the Act remains in effect, appellees will not offer said properties for rental as housing accommodations as such (Finding of Fact 7, R. 132); and that the appellees have offered that the judgment or decree contain a provision or condition that if the housing accommodations are removed from the rental market, and if after such removal, the appellees should sell the properties, that the contract of sale will contain a provision prohibiting the purchaser of the property from thereafter offering to rent, or to rent the housing accommodations, so long as the Act is in effect (Finding of Fact 8, R. 132).

In accordance with these findings, the Court below entered a decree dissolving the preliminary injunction, and granting summary judgment in favor of the appellees. It further decreed that the appellees have the right to evict tenants in accordance with the notice heretofore given by them to the said tenants pursuant to the provisions of Section 209 (a) (5) of the Act; that as long as the Act prohibits the properties involved herein from being rented as housing accommodations, the appellees will not offer or rent them as such; and, in addition, "should the defendants sell any of the properties set forth in plaintiff's complaints, then said agreement of sale shall provide that the purchaser thereof will not place said premises on the rental market to be used as housing accommodations so long as * * * the * * * Act pro-

hibits said premises from being rented or offered for rent as housing accommodations" (R. 138-139) From this Judgment, the Expediter appeals (R. 140)

SUMMARY OF ARGUMENT

I

The original Emergency Price Control Act of 1942 authorized the Price Administrator by regulation to control evictions in order to make the regulation of rents workable and enforceable. The system of eviction control previously embodied in administrative regulations under the Price Control Act was incorporated, with modifications, into the Housing and Rent Act of 1947, as amended. As the Act stood when tried below, evictions were forbidden by Section 209 (a) of the Act so long as the tenant paid his lawful rent. Exceptions to the general rule were contained in six carefully defined subparagraphs to Section 209 (a). Paragraphs (2), (3), and particularly (5) of Section 209 (a) are of controlling significance here. Paragraph (2) specifically allowed eviction of tenants for purposes of sale, where the housing accommodations are to be sold to a cooperative. Paragraph (3) specifically allowed eviction of tenants for purposes of sale, where the landlord has in good faith contracted in writing to sell to a purchaser for his self-occupancy. Paragraph (5) allowed a landlord to evict a tenant where he seeks in good faith to withdraw the housing accommodations from the rental market, and where such accommodations will not thereafter be rented as such.

The Court below held in effect that a landlord could resort to paragraph (5) for eviction of tenants in order to sell the accommodations without, however, complying with the protective requirements of paragraph (3), provided the agreement of sale would contain a provision prohibiting the purchaser from renting the housing accommodations.

The ruling below violates the most elementary principles of statutory construction. Exceptions to the Act must be construed strictly, and may not be extended beyond their express terms. Yet, the construction below imports into the narrow exception contained in paragraph (5), authority to evict tenants and withdraw housing accommodations for purposes of sale, if the contract of sale prohibits renting by the purchaser, even though Congress itself did not see fit to confer that authority in that subsection. The construction below also has the effect of impliedly repealing paragraphs (2) and (3), contrary to the familiar rule that repeal must be explicit. Moreover, the ruling below has the effect of imputing to Congress, an intention to enact meaningless provisions, whereas the law requires that each clause of an Act shall be given effect. In addition, the construction below is bound to impair the effectiveness of the Act.

Evictions go to the very heart of rent control. To construe paragraph (5) as permitting eviction for sale under the conditions provided by the decree below, leaves tenants open to great pressures either of paying unlawful rentals, or being evicted, contrary to the provisions of Section 209 (a). Thus, the ruling below will thwart the purposes of the Act in making rent

control effective. The construction below is also contrary to administrative interpretation of the statute issued shortly after its enactment. This interpretation, while not controlling, is entitled to great weight here.

II

Under amendment in March 1949 of the Act of 1942 and by regulations issued thereunder, landlords are now required to apply to the Housing Expediter for a certificate of eviction before evicting tenants when withdrawal of the accommodations from the rental market is sought. The familiar principle is that subsequent to judgment and before decision by an Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed. Accordingly, the amended law which precisely covers the facts of this kind of case, controls its disposition. (See *Woods v. Durr* (S. Ct.), No. 47, Oct. Term 1948, *per curiam opinion*, April 4, 1949, 17 U. S. L. W. 3298.)

III

The Court also erred in granting summary judgment where the complaint and answer thereto, requests for admissions and responses thereto, and affidavits, established genuine issues of fact to be tried.

IV

The judgment below should be reversed, and the cause remanded with instructions to grant the injunctive relief requested in the complaint.

The Court below erred in holding that withdrawal by a landlord of housing accommodations subject to the Housing and Rent Act of 1947, as amended, for purposes of sale, is a permissible ground for eviction of tenants under Section 209 (a) (5) of the Act, provided the agreement of sale prohibits the purchaser from renting the housing accommodations

The Court below held that withdrawal by a landlord of housing accommodations subject to the Housing and Rent Act of 1947, as amended, for purposes of sale, constituted a permissible ground for eviction of tenants under Section 209 (a) (5) of the Act, provided the agreement of sale barred the purchaser from renting the premises. Contrary to the conclusion reached by the Court below, it is submitted that this construction of the Act must be rejected since:

- a. it is contrary to the plain language of the Act;
- b. it violates many cardinal principles of statutory construction;
- c. it will thwart the purposes of the Act;
- d. it is opposed to the Expediter's official interpretation, which is entitled to great weight here; and
- e. it finds no support in the legislative history of the Act.

These contentions will be discussed in order.

The plain language of Section 209 (a) (5) is opposed to the construction given to it by the Court below

1. The plain reading of Section 209 (a) (5) is opposed to the construction which the Court below gave to that subsection. This subsection provides that no action to recover possession shall be maintainable unless:

the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such.

Under the express provisions of this paragraph, a landlord may evict his tenants only if he intends to withdraw his housing accommodations from the rental market. Of significance is the last portion of that paragraph which reads that "such housing accommodations shall not thereafter be offered for rent as such." The Court below must necessarily have thought that the prohibition upon the landlord in this last sentence is against his subsequent offering of the housing accommodations for rent as such, and not against his sale, and that a sale of the property would constitute its withdrawal from the rental market, provided the agreement of sale prohibited the purchaser from renting the accommodations.

Appellees' construction would require us to interpolate after the words "for the immediate purpose of withdrawing such * * * accommodations from the rental market," the additional words "or for the purpose of selling them provided the sales contract prohibits the purchaser from renting them." Not only the language of the Act, but likewise the difficulty and impracticality of shifting the restrictions of the Act from the seller (landlord) to subsequent purchasers preclude this construction. Even if the agreement of sale bound the purchaser on a contractual basis, there is no legal obligation imposed

by the decree upon the seller (landlord) to enforce this obligation, if the purchaser should breach his agreement. Also, there would be no advantage, financially or otherwise, why the seller should ever want to enforce this part of the agreement, if the purchaser chose to disregard it. Obviously, once the landlord sells his accommodations, it makes no difference to him whether the purchaser occupies the accommodations himself, or whether the purchaser rents the accommodations. The result is that the condition imposed by the decree is an utterly worthless one. For all practical purposes, it makes it possible for the purchaser to rent to a new tenant, as if the condition in the sales contract did not exist. It would leave Section 209 (a) (5) with little meaning if a new owner or a purchaser from him "could offer the property for rent contrary to the terms of the Act" (*Woods v. Cammett*, 80 F. Supp. 636, 639 (D. C. N. H.); *Property Service Company v. Spicknall* (People's Court of Baltimore City), No. 11906-48, decided December 22, 1948, not reported (*infra*, p. 83).

Moreover, the construction of the Act given by the Court below makes it equally possible for subsequent purchasers to rent without restriction, since they are not bound by the original sales agreement. Manifestly, the eviction notice to the prior tenant in which the grounds for eviction were stated, and the sales contract itself, would not have the status of a covenant running with the land, or even be a matter of public record available to subsequent purchasers. How

could we then properly expect subsequent purchasers to be bound by the provisions of Section 209 (a) (5)? As was pointed out in a carefully considered opinion of *Holt v. Loneragan* (Mun. Ct., City of Los Angeles, Cal.), No. 874304 (*infra*, p. 67):

Thus, for example, we would have a common situation arise where one would purchase a house or structure, obviously intended for housing accommodations, standing vacant, with no actual knowledge that the house had been withdrawn from the rental market, with no constructive knowledge even that the premises had been tenant-occupied which could arise by the fact of tenant-occupancy as of the date of purchase of the property, and nothing of record under the recording statutes to put the purchaser on constructive notice of the fact of withdrawal from the rental market. To hold, under such circumstances, that a *bona fide* purchaser for value could subsequent to his purchase be prohibited from renting his property raises in my mind so serious a question of constitutionality that, in accordance with well-established canons of interpretation, such a construction should be avoided.

Nor would it be feasible to require the landlord through injunctive process to place in any deed conveying the property, a covenant against renting the property for housing accommodations. The restraint at most would bind only parties to the suit and, in addition, "even the partial remedy afforded by injunction could not be awarded by most courts in which the eviction proceedings would be maintained, for such courts as the Municipal Courts * * *

have no equitable jurisdiction to issue injunctions” (*Holt v. Longergan, supra*). The Supreme Court also has noted that “justice of the peace courts do not, at least ordinarily, have jurisdiction to grant injunctions to prevent further violations of the Act” (*Porter v. Lee*, 328 U. S. 246, 251). As was said in *Woods v. Krizan* (D. C. Minn.), Civil 2945, decided February 15, 1949 (*infra*, p. 62):

Quite clearly, this section contemplates the withdrawal of property from the rental market and the only possible way a landlord can give assurance that such will be the result of his action is for him to retain control of the property after the eviction. When the landlord seeks to evict a tenant while admitting an intent to sell the property, he admits and makes manifest the fact that he will be in no position to carry out the purpose which he avows. It seems a contradiction to say that a landlord can evict for the purpose of withdrawing accommodations from the rental market and then as proof of his good faith allege an intention which shows that he will be in no position to effectuate his avowed purpose. Even if the landlord sells with the honest intention that the property shall not thereafter be offered for rent he is in no position to bind his grantee in this respect.

2. While the Act imposes no restriction upon the landlord’s right to sell to anyone he chooses, “he cannot remove the tenants to do so” (*Woods v. Palumbo*, 79 F. Supp. 998, 1000 (M. D. Pa.); *Holt v. Lonergan, supra*). Congress was not unaware of the possibility of sale, but apparently felt that for the

adequate protection of tenants, eviction for purposes of sale should be authorized only in extraordinary circumstances. Accordingly, subsection (3) expressly provides for eviction for purposes of sale, but only where:

the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser.

Thus, in the case of eviction for purposes of a sale, two prerequisites must be met. First, the landlord must in good faith contract in writing to sell the accommodations. Second, the purchaser buying the accommodations must use them for his immediate and personal use and occupancy. In that state, not only is it easier to trace and detect evasion, but also tenants are less likely to move until they are assured that the conditions of paragraph (5) have been fulfilled, thus reducing the possibility of evasion. Although neither of these prerequisites of Section 209 (a) (3) were complied with here, yet appellees obtained the same relief which is afforded by that subsection only to those who do comply. The Court below probably felt that the conditions imposed by its decree were an adequate substitute for the letter of the law, and that with those conditions present, a landlord could rely on Section 209 (a) (5), even though he actually sought relief provided by Section 209 (a) (3). That the Court below was wrong in this respect is shown by this Court's decision in *Fontes v. Porter*, 156 F. 2d 956. There, a price regu-

lation provided a higher price for repairs of used machine tools where the repairman provided a written guaranty, and where it was expressly invoiced as having been guaranteed. The appellant (defendant below) claimed that although he had failed to provide a written guaranty, the tool was in fact guaranteed, and that therefore the letter of the regulation should not be applied. Rejecting this contention as untenable, this Court, speaking through Judge Healy, used words which can aptly be paraphrased to fit the facts of the instant case (at p. 958):

Neither of these requirements was met by appellant. In the absence of compliance he was not entitled to take advantage of the price permitted for rebuilt and guaranteed tools. A holding otherwise would encourage equivocation and evasion.

See, also, *Porter v. Nowak*, 157 F. 2d 824 (C. C. A. 1st); *Baggett v. Fleming*, 160 F. 2d 651, 654 (C. C. A. 10th) which are in accord.

Furthermore, if Section 209 (a) (5) is construed as authorizing eviction for sale, regardless of whether there is a bona fide contract of sale, and a showing that the purchaser intended self-occupancy, it would wholly obviate the need for Section 209 (a) (3), where these two conditions must be met before sale can be had. Few landlords, if any, would resort to subsection (3) and its attendant conditions in order to sell, when they could obtain the same results of sale under subsection (5), free from the conditions present in subsection (3) (*Woods v. Cammett, supra*,

80 F. Supp. at p. 638; *Woods v. Palumbo, supra*; *Holt v. Lonergan, supra*).

And even if it be assumed that subsequent purchasers would be scrupulous in observing the law in this respect, the effect of the decision below would still be that a landlord could evict in order to sell to any purchaser intending to use the house personally, without satisfying the protective requirement of paragraph (3) that there must be a bona fide contract of sale prior to the eviction. A landlord can sell a house more easily if the prior tenant is no longer in possession, and if the purchaser can thereby get immediate occupancy. And, as the *Cammett* and *Lonergan* opinions recognize, he can obtain a better price. These advantages to him enable him to exert greater pressure on a tenant to pay rents above the ceiling. If resistance is offered, the tenant will be aware that the landlord can threaten to evict for purposes of sale in a ready market for vacant accommodations, without the necessity of complying with paragraph (3) by first finding a purchaser.

We do not think that Congress intended this result. Had this been its intention, it could readily have said so when Congress amended the Act of 1947 in 1948 by revising several paragraphs of Section 209. Yet, it did not disturb the wording of paragraph (3) by the deletion or addition of a single word. By leaving subsection (3) intact, Congress demonstrated the plainest intention that subsection (3) provided ample means for eviction of tenants for the purposes of effecting sales of property, and that

no broadening of that section was required for the protection of landlords.

3. Not only would the construction below of subsection (5) nullify subsection (3), but likewise it would make it possible to evade with impunity the new provisions contained in subsection (2), designed to curb the "cooperative housing racket." Subsection (2) of Section 209 (a) of the Act of 1947 authorized recovery of possession by the landlord for his immediate and personal use, and has been construed to include the landlord's sons, daughters, and other close relatives. By amendment in 1948, a new proviso was added to subsection (2) requiring tenants of at least 65% of the dwelling units in any cooperative structure to be stockholders, and entitled by reason of stock ownership to proprietary leases before eviction could be had under this subsection. This provision was inserted in the Act to prevent landlords from forcing tenants to buy their apartments in order to escape eviction (Cong. Rec., p. 1517, Feb. 20, 1948). If we accept appellees' theory that a landlord may evict for purposes of sale regardless of the restrictions contained in subsection (5), then by token of the same reasoning, a landlord need not also comply with the 65% requirements of subsection (2). Hence, by gradual degrees or, for that matter, at once, a landlord could evict tenants for purposes of sale under subsection (5), until a 65% participation of new tenants was finally present. Such attempt was in fact made only recently, but without success (*Woods v. Krizan*, *supra*, opinion at p. 62, Appendix; *Woods v.*

Alexander & Baker (W. D. Mo.), decided February 18, 1949 (*infra*, p. 88)). It does not seem likely that these two sections would have been enacted at the same time if Congress had intended paragraph (5) to supersede the specific restrictions on eviction for purposes of sale in paragraph (2).

Thus, also, if Section 209 (a) (5) may be used to evict for purposes of sale, it "could be employed as a means for putting in possession of the housing accommodations relatives of a class not entitled to the benefits of Section 209 (a) (2)" (*Holt v. Lonergan*, *supra*).

b. The construction given to Section 209 (a) (5) by appellees violates the most elementary principles of statutory construction

1. Congress took pains in the original Act and in amending the Act in 1948, to place each independent ground for eviction in a separate section. It obviously intended each section to serve a different purpose. In order to accept appellees' construction of the Act, we must impute to Congress an intention to broaden the provisions of one exception in Section 209, by use of another exception. Appellees' contention on this score might possibly be valid if exceptions to a general rule were entitled to a broad or liberal construction. The contrary is the case. One of the general rules of statutory construction is that a proviso or exception in a statute is to be strictly construed, and one who sets up an exception must establish it as being within the words as well as the reason thereof (*Spokane & Inland R. R. v. United*

States, 241 U. S. 344, 350).² The rule of construction of exemptions from remedial legislation was more recently stated by the Supreme Court in *Phillips Company v. Walling*, 324 U. S. 490, 493, as follows:

Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

For these reasons, we cannot agree with the construction of the Court below. On the contrary, since Section 209 (a) (5) is an exception to be strictly construed, the Court below was not warranted in rewriting the exception in the guise of interpreting it, and in importing into its restrictive language, the words "withdrawal for the purposes of sale, if the contract of sale forbids the purchaser from renting the housing accommodations," contrary to the familiar principles of statutory construction expressed above.

2. The construction might also be sustainable if we could say that subsection (5) was intended to repeal the provisions of subsection (3) or subsection

² For application of this rule by this Court in its construction of various other statutes, see, *Canadian Pacific Ry. Company v. United States*, 73 F. 2d 831 (C. C. A. 9th); *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. C. A. 9th); *McCauley v. Makah Indian Tribe*, 128 F. 2d 867 (C. C. A. 9th).

(2), which provide for eviction for purposes of sale under specified conditions. But repeal or modification of a statute must be explicit; it is elementary that repeals by implication are not favored (see, *Federal Trade Commission v. A. P. W. Paper Company*, 328 U. S. 193, 202; *United States Alkali Association v. United States*, 325 U. S. 196, 209; *United States v. Jackson*, 302 U. S. 628, 632; *Yeung v. Territory of Hawaii*, 132 F. 2d 374 (C. C. A. 9th)). To work a change in existing law of which Congress is deemed to have knowledge, requires the plainest terms to such effect in the amendatory statute (*Thompson v. United States*, 246 U. S. 547, 551; *Thummess v. Von Hoffman*, 109 F. 2d 291, 292 (C. C. A. 3d)).

In *Woods v. Durr*, 170 F. 2d 976 (C. C. A. 3d) (judgment vacated by Supreme Court April 4, 1949, and case remanded, see *infra*, p. 52, footnote 10), the Third Circuit Court was of the view that these canons of construction did not apply because paragraph (3) was included in Section 209 (a) of the Act as originally enacted, while "paragraph (5) was added to that section by the Housing and Rent Act of 1948." We find no authorities to support this distinction, and significantly, none are cited. That the rule is otherwise is shown by *Liberty National Life Insurance Company v. Read*, 24 F. Supp. 103, 108 (W. D. Okla.), 3 Judge Court, where it is said that in the absence of an irreconcilable conflict:

The provisions of the amendatory and amended acts are to be harmonized if same can be reasonably done so as to give effect to each and every part, and not leave any part inoperative. Where an amendment is subject to two con-

structions, either of which is justified by its language, that is to be adopted which harmonizes all parts in construction.

In accord with the view just expressed is Sutherland, *Statutory Construction*, Section 1934 (3d Ed., 1943), where it is said (at p. 430):

SEC. 1934. *Part of section not changed and provisions added by amendment to be construed together.*—In accordance with the general rule of construction that a statute should be read as a whole, as to future transactions, the provisions introduced by the amendatory act should be read together with the provisions of the original act that were reenacted in the amendatory act or left unchanged thereby, as if they had been originally enacted as one section. Effect is to be given to each part, and they are to be interpreted so that they do not conflict.

3. Appellees' argument might be acceptable if we could say that in leaving subsection (3) intact, together with its conditions of sales to purchasers, and in amending subsection (2) as to include provision for sale in cooperative cases, Congress merely intended to retain in the Act several meaningless and empty provisions. But the familiar principle is that "a legislative body is presumed to have used no superfluous words in a statute," and that "effect shall be given to every clause and part of a statute" (*Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208; *Platt v. Union Pacific R. Company*, 99 U. S. 48, 58; *Pacific Gas & Electric Company v. Securities & Exchange Commission*, 127 F. 2d 378, 382 (C. C. 9th)).

In the last cited case, this Court said the following in construing the Public Utility Holding Company Act:

If the company's argument were adopted, then the first and third facts enumerated in the statute would be identical, and the third would therefore be surplusage. In view of the rule, that a legislative body is presumed to have used no superfluous words in a statute (*Platt v. Union Pac. R. Co.*, 99 U. S. 48, 58, 25 L. Ed. 424), and the rule that "effect shall be given to every clause and part of a statute" (*Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208, 52 S. Ct. 322, 323, 76 L. Ed. 704) we think the construction of the statute by the Commission which gives effect to the entire statute is correct and must be sustained.

A similar view was expressed by Judge Joyce in *Woods v. Krizan*, *supra*, where a landlord sought to evict tenants under Section 209 (a) (5) in order to sell his accommodations to tenants as a cooperative:

I think paragraph 3 of 209 (a) has just as much importance as the paragraphs numbered 1 to 6, of which it is a part. Why should I disregard paragraph 3 when I think Congress gave it a meaning and importance which I cannot in good conscience disregard.

This conclusion is further aided by another traditional canon of statutory construction that courts will give preference to that construction which does not impair the effectiveness of the legislation (*Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, 392; *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 333).

Moreover, the opinion of the Court below overlooks the 65% cooperative provisions added by Section 209 (a) (2) of the Act of 1947 by amendment in 1948, at the same time that Section 209 (a) (5) was added. It seems strange that Congress on one hand should have strengthened compliance, by amending the Act in order to combat the cooperative racket by requiring a minimum of 65% participation of tenants in the cooperative before a single tenant could be evicted for purposes of sale, and yet in the same breath have added subsection (5) by which, on the basis of the opinion below, an easy means is made available to deprive every tenant of that protection.

c. The construction of the Act by the Court below would thwart its purposes of making rent control effective

It must be evident that the construction of the Act below would thwart the purposes of making rent control effective. Any breach in the system of control created by the Expediter over evictions has an immediate effect upon his control over rents themselves.³ The Supreme Court recognized the relation of the control of evictions to control over rents during an earlier but similar emergency in *Block v. Hirsh*, 256 U. S. 135, 157-158, when it said: "If the tenant re-

³ "A tenant in the face of a threat of eviction during a period of housing shortage would be under great pressure to acquiesce in some disguised or roundabout arrangement devised by the landlord to circumvent or evade the rent ceiling. And if a tenant who refused to pay more than the maximum rent were subject to eviction, the landlord might readily find, among pressing applicants for housing accommodations, someone who would agree to a surreptitious violation of the regulation" (*Taylor v. Bowles*, 145 F. 2d 833, 834 (E. C. A., 1944)).

mained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail." More recently, the Supreme Court gave similar recognition to this relationship under the Emergency Price Control Act of 1942. In *Parker v. Fleming*, 329 U. S. 531, 536-537, this Court said: "The Emergency Price Control Act was intended in part to prevent excessive rents in the public interest, and the very anti-eviction regulations under which the Administrator granted the eviction certificate here were specifically designed to prevent manipulative renting practices which would result in excessive rents."

In other decisions under the Emergency Price Control Act of 1942, the Supreme Court has repeatedly given effect to the principle that rent control cannot hope to succeed unless eviction control is equally effective (cf. *Porter v. Lee*, 328 U. S. 246; *Porter v. Dicken*, 328 U. S. 252; *Fleming v. Rhodes*, 331 U. S. 100). The views expressed in this respect are equally applicable to the construction of the specific provisions against unlawful eviction contained in the present Act. Contrary to the view of the Court below, a definite purpose of the Act of 1947, as amended, would be served by keeping a tenant in possession of accommodations which the landlord seeks to withdraw for purposes of sale, even where the sale contract prohibits the purchaser from renting the accommodations. True, the landlord may obtain a higher price for his accommodations with vacant possession than with tenants in them (*Woods v. Cammett*, 80 F. Supp. 636 (D. C. N. H.); *Holt v. Lonergan* (Mun. Ct., City of Los Angeles, Cal.), No. 874,304 (*infra*, p. 67), but

unrestricted eviction for purposes of sale would leave tenants at the complete mercy of unscrupulous landlords. Scarcely any tenant would be safe in his possession under that state of the law, since most housing accommodations in these critical times are worth more when empty than when occupied. With eviction control absent where landlords manifested the slightest intention to sell, the pressure upon the tenants to pay higher than ceiling rentals would be too great to resist, and if they did offer resistance to rent increases, wholesale eviction for purposes of sale would inevitably follow. It requires no vivid imagination to envisage what a "field day" speculators would enjoy under that state of the law, and what opportunity there would be for all kinds of unlawful manipulation. We may not reasonably impute to Congress any intention to bring about such disastrous results.

In view of the experience of the Expediter, and his testimony at the Congressional Hearings (see, *infra*, p. 97) that "evictions go to the very heart of rent control," it seems more reasonable to believe that Congress fully recognized that rent and eviction control are inseparable. In the face of this background of law and experience, it would have been inconsistent for Congress to restrict a landlord from evicting tenants for purposes of obtaining unlawful rents, but leave him free to do so in order "to make a killing" upon the sale of his accommodations.⁴ Such an ab-

⁴ "Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated * * *. His property may lose utility * * * as a consequence of regulation. But that has never been a barrier to the exercise of the police power" (*Bowles v. Willingham*, 321 U. S. 503, 517, 518).

surd result can flow only from an interpretation which is "outside the bounds of normal meaning" (*Addison v. Holly Hill Company*, 322 U. S. 607, 617). "To agree to such a construction would defeat the purposes of this legislation" (*Woods v. Palumbo*, 79 F. Supp. 998 (M. D. Pa.)). This was likewise the conclusion reached in *Woods v. Cammett*, *supra*, where the Court said the following in this connection: "The withdrawing of these accommodations from the rental market, when such withdrawal is not of a permanent character within the meaning and intent of Section 209 (a) (5), but for the purpose of sale, defeats in some measure the aim of rent-control legislation. Under this procedure the property is held vacant for a time uncertain, dependent upon the condition of the real estate market and the consummation of an agreement satisfactory to the buyer and seller, likely producing speculation in vacant housing accommodations" (80 F. Supp. at p. 638).

So, too, in *Property Service Company v. Spicknall* (People's Court of Baltimore City), No. 11906-48, decided September 22, 1948, not reported (*infra*, p. 83), the Court said: "To apply any other interpretation to Section 209 (a) (5) of the Housing and Rent Control Act of 1948 would distort its language and lead to illegal eviction of tenants with subsequent speculation in vacant housing accommodations which the legislative branch of the Federal government had hoped to prevent." This decision was recently upheld by the City Court of Baltimore City, sub. nom, *Fox v. Robertson, et al.*, decided January 11, 1949 by Judge Emery Niles (*infra*, p. 78).

In *Holt v. Loneragan, supra*, which contains an exhaustive discussion of the question, Judge Stevens said: "If, however, Section 209 (a) (5) is construed to permit eviction and withdrawal for the purpose of sale, it would become a ready instrument for a type of eviction not contemplated nor intended by Congress, and which could result only in the utmost confusion when the property reached the hands of subsequent purchasers."

Thus, each of these decisions are in accord with the view of the Expediter that to construe Section 209 (a) (5) as allowing eviction for purposes of sale would seriously impair the object of the statute of protecting the public against inflationary pressures during an acute housing shortage.

d. The construction given to Section 209 (a) (5) by the Court below is also contrary to administrative interpretation of the statute issued shortly after its enactment. This interpretation, while not controlling, is entitled to great weight

The construction of Section 209 (a) (5) by the Court below is also contrary to an official interpretation of the statute issued shortly after its enactment. This interpretation, as amended,⁵ reads as follows (13 F. R. 6317) :

* * * A landlord may not, under section 209 (a) (5), evict a tenant from housing accommodations for the purpose of obtaining vacant possession in order to sell the housing accommodations. Since section 209 (a) (5) is

⁵ Section 209 (a) (5) was included in the amendments of March 30, 1948, effective April 1, 1948. On May 25, 1948, the Office of the Housing Expediter issued Housing and Rent Act Memorandum No. 51, which was amended October 25, 1948 (13 F. R. 6317).

only one of several grounds for eviction under the act, it is clear that it was not intended that this section should broaden or defeat the purpose of limitations placed in the other grounds. It follows, therefore, that since section 209 (a) (3) provides for eviction where "the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser," section 209 (a) (5) may not be used in cases where sales are involved.

That is to say, since a tenant may be evicted for occupancy by a purchaser under section 209 (a) (3), a landlord may not evict under section 209 (a) (5) for the purpose of obtaining vacant possession in order to sell.

While this interpretation of a statute is not binding on the courts, it is, however, entitled to great weight (*Skidmore v. Swift & Company*, 323 U. S. 134, 139-140), particularly since "it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion" (*Norwegian Nitrogen Company v. United States*, 288 U. S. 294, 315; see, also, *United States v. American Trucking Association*, 310 U. S. 534, 549).⁶

⁶ It was likewise the long standing interpretation under the Emergency Price Control Act that eviction for purpose of sale of property was not permissible under Section 6 (b) (1) of the Rent Regulation for Housing issued thereunder (Rent Interpretation 6 (b) (2)—VIII, Pike & Fischer, OPA Rent Service, p. 200: 2165, *infra*, p. 59; Rent Memorandum 6 (b) (1)—VI, *Ibid.*, p. 200: 2151, *infra*, p. 58; see, too, *In the Matter of Josephine B. Wetherford*, 5 OPA Op. & Dec. 3169). Section 6 (b) (1) referred to above provided for issuance of certificates where eviction was not inconsistent with the Act or Regulation (*infra*, p. 57).

e. Contrary to the opinion in *Woods v. Durr*, 170 F. 2d 976 (C. C. A. 3rd), *supra*, the legislative history of paragraph (5) fails to support the construction which the District Court adopted

In *Woods v. Durr, supra*, the Court reached the conclusion that "the legislative history of subsection (5) supports the literal construction that a landlord may resort to Section 209 (a) (5) to evict tenants for purposes of sale. The Supreme Court granted certiorari in this case on February 14, 1949. On April 4, 1949, the Supreme Court vacated the judgment of the Third Circuit in the *Durr* case and remanded the cause to that Court "for a consideration of the effect of Section 209 of the Housing and Rent Act of 1949, approved March 30, 1949, and the eviction regulations of the Housing Expediter issued pursuant thereto." It may be pointed out at this time, however, that careful analysis of each legislative reference referred to in the *Durr* opinion below fails to disclose a single statement expressly or impliedly supporting the view that paragraph (5) allows eviction for purposes of sale.

Considering the legislative references in the order cited by the Court below, we find the following (R. 43-44):

The first reference from Senate Report No. 896, 80th Congress, 2d Session, page 13, refers to Section 302 of the Act, and explains that a similar provision (Sec. 4 (d)) was in the Act of 1942 (see discussion, *infra*, p. 33, on Sec. 302 and Sec. 4 (d)). It then refers to paragraph (5), and merely offers by way of explanation, the words of the statute. Nothing is said in either paragraph, however, in any way suggesting that paragraph (5) may be utilized to evict for sale.

The next reference is from Senate Report No. 896, 80th Congress, 2d Session, page 4, which likewise merely repeats the words of the Act. The substance of Senator Cain's remarks (94 Cong. Rec., p. 1515), which follow, are of like purport. Thus, this Court will search in vain, as we did, for any expression in the legislative history even remotely intimating that landlords may turn to paragraph (5) where they desire to sell. As was said in *Holt v. Lonergan* (Mun. Ct., City of Los Angeles, Cal.), No. 874,304, *infra*, p. 32): "It is true that the legislative history of Section 209 (a) (5) and the clear import of the language in that subparagraph gives the landlord the right, where he is acting 'in good faith,' to withdraw his property from the market while it is tenant-occupied. But nothing that I read in the Committee reports or in Senator Cain's remarks on the floor of the Senate indicates a Congressional intent that a landlord may withdraw his property from the rental market and evict the tenant then in occupancy solely for the purpose of facilitating the salability and to increase the sales price of the premises." In this connection, this Court's observation in *Pacific Gas & Electric Company v. Securities & Exchange Commission*, 127 F. 2d 378, 382, is persuasive when it said:

The company quotes a portion of a committee report, and a part of Senator Wheeler's argument in the debates on the act. While the report sheds no light on the present question, the portion of the argument mentioned definitely supports the company's view. We think such argument must be disregarded because contrary to the plain meaning of the act. *Penn-*

sylvania R. R. Co. v. International Coal Co.,
230 U. S. 184, 198, 199, 33 S. Ct. 893, 57 L. Ed.
1446.

We submit that a fair reading of paragraph (5) in its historical context will likewise demonstrate that it was not meant to have the sweeping effect given it by the Court below.

The original Emergency Price Control Act of 1942 (56 Stat. 23, 767) authorized the Price Administrator by regulation to control evictions in order to make the regulation of rents workable and enforceable (*Taylor v. Bowles*, 137 F. 2d 654, 661-662 (E. C. A.); cf. *Parker v. Fleming*, 329 U. S. 531; *Porter v. Lee*, 328 U. S. 246; *Porter v. Dicken*, 328 U. S. 252). The system of eviction control previously embodied in administrative regulations under the Price Control Act was incorporated, with modifications, into the Housing and Rent Act of June 30, 1947 (61 Stat. 193, 50 U. S. C. App., Supp. I, 1891-1899), as amended by the Act of March 30, 1948 (Pub. Law 464, 80th Cong.). The original predecessor of paragraph (5) was Section 4 (d) of the Price Control Act of 1942 (56 Stat. 28, 50 U. S. C. App., Sec. 904 (d)), which provided that:

Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

This proviso was placed in the Act to avoid constitutional difficulty, so that the Act would not be considered as imposing an obligation to sell or rent on a property owner (*Bowles v. Willingham*, 321 U. S. 503, 517). As stated by the Emergency Court of Appeals in *Wilson v. Brown*, 137 F. 2d 348, 352:

In accordance with this statutory provision, the regulation now in question [in 1942] provides that a landlord may evict a tenant whose lease has expired if he "seeks in good faith not to offer the housing accommodations for rent." The landlord is thus free to occupy the property himself, or devote it to some commercial enterprise, or utilize it in any other way. This serves to emphasize that there has been no "taking" of his property in the constitutional sense.

At the same time, there were administrative regulations having the force of law, which protected a tenant against immediate eviction by a landlord intending to sell (Rent Regulation for Housing, Sec. 6 (b), 11 F. R. 12061). The landlord was required to obtain an eviction certificate from the Administrator. Such a certificate could be issued upon a showing that the purchaser had paid at least 20% of the purchase price, and a tenant could not be evicted for from three to six months thereafter, except when administratively authorized in exceptional cases. Obviously, a landlord could not evict a tenant for purposes of selling the property in disregard of this regulation by relying on Section 4 (d), nor could a tenant be evicted without compliance with the certificate provisions of the regulation, even where the accommodations were sold upon a judicial sale (cf. *Porter v. Dicken*, *supra*).

The Housing and Rent Act of 1947 substituted paragraph (3) of Section 209 (a), with its requirement of a prior contract for sale, for the earlier regulations governing eviction for purposes of sale.

The 1947 Act contained no provision similar to that formerly in Section 4 (d) allowing withdrawal of the housing accommodations from the rental market, but this was an inadvertent omission. The omission had been noted by the time the 1948 amendments were under consideration. The Senate Committee, reporting the 1948 bill, stated explicitly (Sen. Rep. 896, 80th Cong., 2d Sess., p. 13):

While the committee does not believe that the absence of such a provision implies that any person is required to offer housing accommodations for rent, in view of the fact that a similar provision was in the Emergency Price Control Act of 1942 it has been included here *to remove any doubt*. [Italics added.]

This statement was made in connection with the reinstatement in the Act, as Section 302, of a provision almost identical with the language of Section 4 (d) of the 1942 Act.⁷ Paragraph (5) of Section 209 (a), which was added to the Act at the same time as Section 302, was intended to make it clear that a person seeking to use his property as permitted by Section 302, could lawfully evict a tenant for that purpose (see, *Holt v. Lonergan, infra*, p. 14).

The legislative history of the 1948 amendments, substantial portions of which are quoted in the *Durr* opinion and which are discussed at page 22, is completely silent as to whether the new paragraph (5) was meant to apply to sales, and as to its relationship,

⁷ Section 302 reads as follows: "Nothing in this Act or in the Housing and Rent Act of 1947, as amended, shall be construed to require any person to offer any housing accommodations for rent" (Pub. Law 464, 80th Cong., 2d Sess.).

if any, to paragraph (3), which specifically dealt with evictions for purposes of sale. It is hardly believable that if paragraph (5) had been intended drastically to limit, and even in large part to nullify paragraph (3), something in the legislative history would not have at least suggested that the two paragraphs dealt with the same subject matter, or overlapped in some way.

In the absence of any indication to that effect, we think it clear that paragraph (5) and Section 302 together were meant to have the same scope as their predecessor in the Emergency Price Control Act—that is, to make clear for constitutional purposes that an owner of housing accommodations was not obligated to leave it in the rental market. If the accommodations “became vacant either by resort to lawful legal process or by voluntary action of the tenant * * * Section 302 would operate to enable the landlord to decline to rerent the premises, if he so desired” (*Holt v. Loneragan, supra*; cf. *Wilson v. Brown, supra*; *Bowles v. Willingham, supra*). If, however, a tenant is already in the accommodations, Section 302, as implemented by Section 209 (a) (5), authorizes his eviction so that the accommodations can be withdrawn from the rental market. But, it was not intended to permit the owner to evict for any of the purposes specifically referred to in the other paragraphs of the same section, without complying with the requirements of those paragraphs (see, *Holt v. Loneragan, supra*). This has been the administrative interpretation of the statute since shortly after its enactment (*supra*, p. 29), and this has likewise been the

interpretation given the statute by substantially every court that has had occasion to deal with the problem. *Woods v. Hillcrest Terrace Corp.*, 170 F. 2d 780 (C. C. A. 8th); *Woods v. Cammett*, 80 F. Supp. 636 (D. C. N. H.); *Woods v. Palumbo*, 79 F. Supp. 998 (M. D. Pa.); *Property Service Company v. Spicknall*, No. 11906-48, decided September 22, 1948, by the People's Court of Baltimore concurring *en banc*, affirmed sub. nom., *Fox v. Robertson, et al.* (City Court, Baltimore City, Md.), decided January 11, 1949, by Judge Emery Niles (*infra*, p. 78); *Holt v. Loneragan, supra*; *Poche v. Thibodeaux* (Court of Appeals, Parish of Orleans, State of Louisiana), No. 19069, decided January 25, 1949; *Woods v. Krizan* (D. C. Minn.), Civ. 2945, decided February 17, 1949, by Judge Joyce; *Woods v. Alexander & Baker* (W. D. Mo.), decided February 18, 1949; *Woods v. Weber* (D. C. S. Dak.), No. 609 S. D., preliminary injunction granted February 9, 1949. The last six cases, as well as the *Hillcrest* case, were decided after the *Durr* decision was rendered.⁸

f. *Taylor v. Bowles*, 145 F. 2d 833 (E. C. A.), does not support the ruling below

In *Woods v. Durr, supra*, the Court also stressed the holding in *Taylor v. Bowles, supra*, as supporting the conclusion reached by it. Speaking of this case, the Court below said that it had "placed a

⁸ Contra: *Woods v. Durr, supra*; *Woods v. Seaton* (E. D. Va.), No. 340, appeal submitted in the Fourth Circuit, pending outcome in Supreme Court of *Woods v. Durr*. Judge Bryan initially issued a temporary injunction, but on the basis of the *Durr* decision, reversed his ruling and denied relief.

broad construction upon Section 4 (d) of the Emergency Price Control Act, holding that under its provisions, a landlord might withdraw his housing accommodations from the rental market merely because of dissatisfaction with the existing maximum rents" (R. 45).

We agree that the construction given Section 4 (d) of the Emergency Price Control Act of 1942 by the *Taylor* case is correct to the extent indicated above. The same construction may be extended to Section 302 of the present Act, likewise permitting withdrawal of accommodations from the rental market because of a landlord's dissatisfaction with existing rentals. But, neither Section 302 or its predecessor, Section 4 (d), or the *Taylor* case may be relied on for the proposition that eviction of a tenant is permissible for purposes of making the accommodations more salable.

The question in the *Taylor* case was not whether a person could evict a tenant for purposes of making his accommodations more salable, nor were there involved in that case provisions of eviction control similar to those contained in the Housing and Rent Act of 1947. The facts showed that Taylor had unsuccessfully carried on a running fight with the Price Administrator from the time that rent controls were imposed. Finally, Taylor decided to withdraw his rental accommodations from the rental market, pursuant to Section 4 (d) of the Act, because of his dissatisfaction with existing maximum rentals. Unlike the situation which existed under Section 209 of the Act of 1947, where eviction had been placed in the hands of the courts, when a landlord under the Act of 1942 sought

withdrawal of accommodations from the rental market, he initially had to apply for an eviction certificate from the OPA. Accordingly, Taylor filed an application for such a certificate, asserting that he desired to withdraw the apartment house from the rental market. He satisfied the Regional Administrator that he preferred to leave the apartments vacant, rather than to continue renting them at existing ceilings, and also that if, after the lapse of a temporary period, he did not succeed in securing an upward revision of the ceilings, he intended to dispose of the apartment house. While counsel for the Administrator in oral argument contended that Taylor's past conduct justified the conclusion that the real purpose was to evade the Act and to get more complacent tenants into the building, significantly, the Regional Administrator made no such finding. The Emergency Court said in this connection (at p. 835):

* * * indeed, the findings that he did make are inconsistent with the supposition that the contemplated eviction was merely another maneuver by Taylor to accomplish further violations of the regulation.

Finally, the Emergency Court concluded that regardless of what Taylor's past conduct was, the Act of 1942 did not compel him to continue renting the apartments at the existing level of maximum rents. As the Court said (at p. 836):

Since Section 4 (d) of the Act permits him thus to withdraw the apartment house from the rental market, it necessarily follows that to

grant him the certificate of eviction *on the basis of the facts found by the Regional Administrator*, would not be inconsistent with the purposes of the Act. [Italics added.]

In other words, since both Taylor's application and the findings of the Regional Administrator established that the alleged grounds for eviction were not contrary to the Act, but were pursuant thereto, eviction was permitted. In view of the fact findings mentioned above, that case is manifestly distinguishable from the instant case.

That the ruling of the *Taylor* case should be limited to the specific fact findings which were present in that case is shown by the recent decision in *Woods v. Hillcrest Terrace Corp.*, 170 F. 980 (C. C. A. 8th), as well as by opinions of the Price Administrator (see, e. g., *In the Matter of 215th Place & 43rd Avenue, Corp.*, 5 OPA Op. & Dec. 3155; *In the Matter of Josephine B. Wetherford, Jr.*, 5 OPA Op. & Dec. 3169).

In *Woods v. Hillcrest Terrace Corp.*, *supra*, an action was brought by the Expediter to restrain alleged unlawful evictions, principally on the ground that the landlord was invoking Section 209 (a) (5) of the Act in order to make his accommodations more salable, rather than to withdraw them from the rental market, as required by that subparagraph. The complaint in that case contained three separate counts, the first of which alleged that the defendants were seeking to evict tenants under Section 209 (a) (5) to make the accommodations more salable. The District Court granted defendant's motion to dismiss the

action on the ground that the complaint failed to state a claim upon which relief could be granted. On appeal, the Eighth Circuit reversed the judgment below, remanded the case for trial, and directed the District Court to issue a preliminary injunction pending the outcome upon trial. Concluding that the Federal Court had jurisdiction of the action for the purpose of "effectuating in the public interest, the policy and intent of Congress," the Court, speaking through Judge Sanborn, said the following (170 F. 2d at p. 976):

The appellees are in no position on this appeal to assert that they are seeking in good faith to recover possession of their housing accommodations for the purpose of legitimate sale or to permanently withdraw the accommodations from the rental market, or that they are merely refusing to rent such accommodations (compare *Taylor v. Bowles*, Em. App., 145 F. 2d 833, and *Woods v. Durr*, 3 Cir., 170 F. 2d 976, opinion filed November 8, 1948), since the complaint negatives those assertions.

By its cf. reference to the *Taylor* case, the Eighth Circuit indicated that that case must be limited to its specific facts; by its remand of Count I, the Eighth Circuit indicated its disagreement with the *Durr* opinion.

To sum up the issues: The construction which the Court below gave to the Act is contrary to the plain language used; it ignores familiar rules of statutory construction requiring strict construction of exemptions; it nullifies other portions of the Act and leads to absurd results; it is bound to produce widespread

eviction and unlawful rent increases. Had Congress intended in Section 209 (a) (5) to permit eviction for purposes of sale whenever a landlord found it desirable or necessary to sell under conditions such as are imposed by the decree below, it could easily have so provided. It need not and would not have taken the pains to detail each exception in the language which it employed. But, as the Supreme Court observed in *Addison v. Holly Hill Company*, 322 U. S. 607, 617: "Congress dealt with exemptions in details and with particularity," and accordingly, "exemptions made in such detail preclude their enlargement by implication." This well-settled rule of statutory construction has been widely applied to many peace-time statutes. Without dispute, similar construction should be given to an Act which the Supreme Court in *Woods v. The Cloyd W. Miller Company*, 333 U. S. 138, sustained as a valid exercise of the emergency powers of Congress.

II. Under the Housing and Rent Act of 1947, as amended in 1949, and under the regulation issued thereunder effective April 1, 1949, appellees are required to apply to the Housing Expediter for a certificate of eviction before evicting their tenants. A change in the law between a *nisi prius* and an appellate decision requires the Appellate Court to apply the changed law. (See, *Woods v. Durr* (S. Ct.), No. 476, Oct. Term 1948, *per curiam opinion*, April 4, 1949.)

For the reasons indicated in Point I it is clear that the District Court erred in failing to grant the injunctive relief requested by the complaint. There is, however, another reason why this judgment should be reversed. After the entry of the judgment in the District Court, and while this case was pending

on appeal, Congress, on March 30, 1949, amended Section 209 of the Act⁹ to read as follows:

Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act. (Pub. L. 31, 81st Cong., 1st Sess., Ch. 42.)

The purpose of this amendment was to withdraw from the courts the initial determination as to whether a landlord was entitled to recover possession of controlled housing accommodations, and to vest that determination in the Housing Expediter, as it was in the Price Administrator under the Emergency Price Control Act of 1942 (see, *supra*, p. 33). Pursuant to this amendment to the Act, the Housing Expediter issued the Controlled Housing Rent Regulation, as amended, effective April 1, 1949 (*infra*, p. 100), which requires a landlord who seeks to withdraw his ac-

⁹ "The bill would also give the Housing Expediter authority to issue regulations governing the eviction of tenants from controlled housing accommodations. This will permit uniformity in the operation of eviction provisions, which under existing law are the subject of variation between local courts which results in actions that are discriminatory as between tenants in different local court jurisdictions. The committee believes that restrictions on evictions should be the same in every locality" (Report of Senate Committee on Banking & Currency on Housing and Rent Act of 1949 (81 Cong., 1st Sess., Report No. 127, p. 10).

accommodations from the rental market, to apply to the Expediter for a certificate of eviction.

Applying the provisions of this Regulation to the facts of this case, there can be no question but that appellees must now seek the permission of the Housing Expediter before they proceed to evict any tenants for the purposes of withdrawing their accommodations from the rental market. This is the import of the Supreme Court's *per curiam* decision in *Woods v. Durr, supra*, p. 52, in vacating the judgment of the Third Circuit and in directing that Court to give consideration to the new Act and Regulation. Under established principles, this is the law to be applied by this Court now, "even though it may differ from that which existed when the case was tried below" (*Alameda County v. United States*, 124 F. 2d 611, 616 (C. C. A. 9th)). "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law" (*Ziffirin, Inc. v. United States*, 318 U. S. 73, 78, 63 S. Ct. 465, 469, 87 L. Ed. 621; *Carpenter v. Wabash Railway Company, et al.*, 309 U. S. 23; *Texas Company v. Brown, et al.*, 258 U. S. 466; *Vandenbark v. Owens-Illinois Glass Company*, 311 U. S. 538; *Hines v. Davidowitz*, 312 U. S. 52; *Standard Oil Company of Kansas, et al. v. Angle, et al.*, 128 F. 2d 728 (C. C. A. 5th); *Interstate Hotel Company v. Remick Music Corp.*, 157 F. 2d 744, 749 (C. C. A. 8th)).

A case closely in point is *Standard Oil Company of Kansas v. Angle, supra*. Two suits were involved in this case. There was one by the appellant, Standard Oil Company of Kansas, against A. J. Angle, as

collector of customs for the District of Florida, and other defendants, to compel the delivery of tires imported from Cuba. There was another suit filed by A. J. Angle, as collector of customs for the District of Florida, and others, against the Standard Oil Company of Kansas and others, to restrain the delivery of such tires. In appellant's suit, it was claimed that appellant, as importer, had complied with all customs regulations and requirements, and that it was the mandatory duty of Angle, appellee, to deliver the tires to it. In appellee's suit, and in his defense to the suit brought by the appellant, he claimed that the Office of Price Administration, acting under the authority of the Tire Rationing Regulations, had directed and enjoined him not to deliver the tires except in accordance with authorization from that office, and that he was holding them pursuant to those directions. Appellant, on the other hand, asserted that the Regulations did not extend to, and were not effective to prevent its taking delivery of the tires. The District Court concluded that the delivery which the plaintiff sought was prohibited by the Tire Rationing Regulations and, accordingly, entered a decree dismissing the appellant's suit and restraining his efforts to obtain delivery. The plaintiff, Standard Oil Company of Kansas, appealed. After its appeal was taken, the Regulation was amended in terms which unequivocally declared that appellant was not entitled to the delivery of the tires without authorization by the Office of Price Administration. Accordingly, upon appeal, the appellee urged that even if the

District Court were mistaken in its judgment that the Regulations dealing with tire rationing did not apply when the District Court rendered its judgment, that the judgment in any event should be affirmed upon the authority of the revised regulation. Sustaining this view, the Fifth Circuit Court said the following (128 F. 2d at p. 730) :

But if we could agree with appellant that the district judge incorrectly interpreted the order as it existed when the judgment was entered this would not avail it, for by amendment of the regulation, the precise situation here under review was expressly brought within it. In *United States v. The Schooner Peggy*, 1 Cranch 103, at page 110, 2 L. Ed. 49, the Supreme Court in 1801 first gave expression to the governing rule. "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation." It has never departed from it. *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327; *Hines v. Davidowitz*, 312 U. S. 52, 61 S. Ct. 399, 85 L. Ed. 581; *Texas Company v. Brown*, 258 U. S. 466, 42 S. Ct. 375, 66 L. Ed. 721. If then the terms of the original regulations left the question of their coverage in doubt, and we do

not think they did, the amended regulations in terms precisely cover this case, and, under the principle above set out, control its disposition.

In *Carpenter v. Wabash Ry. Company*, 309 U. S. 23, the same principle was applied. There, the petitioner had recovered a judgment against the Wabash Railway Company for personal injuries sustained in the course of his employment by that company. The Wabash Railway then went into equity receivership. The petitioner filed his claim in those proceedings as a priority claim. The master allowed the claim as an unsecured claim without lien or priority. The District Court sustained this disposition, and its ruling in turn was upheld by the Circuit Court of Appeals on the ground that claims for personal injuries by employees were not entitled to priority as operating expenses under the state law or the state court decisions. After the petitioner filed his petition for certiorari, Congress amended Section 77 (n) of the Bankruptcy Act so as to apply to equity receiverships, and as to provide priority for claims for personal injuries to employees of a railroad corporation in an equity receivership. The Supreme Court granted certiorari limited to the question of the right of the petitioner to intervene in the equity receivership proceedings in order to assert priority of his claim. Speaking through Chief Justice Hughes, the Supreme Court said the following (at pp. 26-27):

For the present purpose, we may assume, without deciding, that the determination of the court below was correct upon the record before it and in the light of the law as it then stood.

But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable. * * *

We are of the opinion that the amended statute is applicable to this proceeding.

In this case, also, the Supreme Court restated the controlling rule to be that declared by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103, 110, which is quoted above.

Based upon the foregoing authorities, it is submitted that the Act of 1947, as amended in March 1949, and the Regulations issued thereunder, must be given binding effect in deciding this appeal, even though passed after the judgment below was rendered.

III. The Court erred in granting summary judgment when the complaint, the answer thereto, requests for admissions, responses thereto, and affidavits, established genuine issues of fact to be tried

The judgment below must also be reversed because the Court granted summary judgment, although the complaint, the answer thereto, requests for admissions, responses thereto, and the affidavits established genuine issues of the fact to be tried.

Paragraph IX of the complaint in No. 8451-PH, dealing with the eviction of Alvin L. Fite, alleged that the appellees had commenced the eviction proceedings and served notice of eviction for the avowed purpose of making the housing accommodations vacant in order that the same might be sold to persons who would purchase them for use as their residences (R. 4). In answer thereto, the appellees admitted

that they had served the notice for the purpose of evicting the tenant, Alvin L. Fite, but denied that there was any bad faith or other ulterior motive on their part, and denied each and every other allegation in Paragraph IX (R. 22). Paragraph X of the complaint alleged that the appellees were evicting tenants from other properties of which they were landlords, by serving similar notices to quit with the same expressed avowed purposes alleged in Paragraph IX (R. 4), and Paragraph XI of the complaint alleged that these acts were in violation of the Housing and Rent Act of 1947, as amended (R. 4-5). In their answer, appellees denied that the acts were in violation of the Act of 1947, as amended. On the contrary, they alleged that said acts were within the provisions of the regulations, and denied each and every other allegation of Paragraphs X and XI (R. 22). Similar allegations were made in the actions filed in No. 8452-PH to restrain the eviction of Lucy A. Heustis, Paul R. Moberly, and Henry Monkiewicz (R. 55), and similar denials respecting these allegations were asserted in the answers filed in those cases (R. 76-77). The same allegation appeared in the complaint filed in No. 8453-PH to restrain the alleged unlawful eviction of Max Ravnitzky (R. 99-100), and appellees asserted the same denial in their answer filed in that case (R. 116-117).

In request for admission No. 10, appellees were asked to respond to the request for admission that they sought to evict a tenant for the purpose of making the housing accommodations vacant in order that the same might be redecorated and thereafter sold

to persons who would purchase such housing accommodations for use as their residences (R. 31). Appellees' response to this request for admission was that they "object to answering the request for admission 10 on the grounds that it is irrelevant, immaterial and not within the purview of the action." Similar requests for admissions were filed in the cases involving the eviction of the other tenants above referred to, and similar responses were made thereto (R. 37).

Thus, there were present, material and genuine issues of fact to be tried in this case. It was clearly not a case which could be disposed of by affidavit. "Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous" (*Eccles v. Peoples' Bank*, 333 U. S. 426, 434). On a motion for summary judgment, the question is not how the issue should ultimately be determined, but solely whether there is a genuine issue of fact (*Gifford v. Travelers' Protective Assn.*, 153 F. 2d 209, 211 (C. C. A. 9th)).

It should also be noticed that the appellees moved for summary judgment on the ground that the complaint set forth no cause of action. In their affidavits, appellees claimed that some of the tenants were no longer in possession (R. 45). The Court found that the tenants, Alvin L. Fite and Henry Monkiewicz, voluntarily vacated the premises prior to any proceedings brought against them in connection with the eviction, and that as to said properties, this action was moot (R. 131). The Court was in error in this respect (*Porter v. Lee*, 328 U. S. 246; *Porter v. Merhar*, 160

F. 2d 397 (C. C. A. 6th)). As the Supreme Court said in *Porter v. Lee, supra* (at p. 251-252):

We also think the Circuit Court of Appeals erred in holding that the case was moot. The mere fact that the Beevers, in order to comply with the writ of possession, vacated the apartment was not enough to end the controversy. It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*. *Texas & New Orleans R. Co. v. Northside Belt R. Co.*, 276 U. S. 475, 479. The Administrator, therefore, was entitled to seek a restoration of the *status quo* in this case. See *Henderson v. Fleckinger*, 136 F. 2d 381-382. Moreover, here the Administrator sought to restrain not merely the eviction of Beaver but also that of any other tenant of the landlord as well as other acts in violation of the Regulation. Section 205 (a) authorizes the District Court in its discretion to grant such a broad injunction upon a finding that the landlord has engaged in violations. See *Hecht Co. v. Bowles*, 321 U. S. 321. If the eviction proceeding actually was a violation of the Regulation, then Beaver's vacating the premises was merely the completion of one violation. The issue as to whether future violations should be enjoined was still before the Court and was by no means moot.

From the foregoing, it is manifest that the Court below was in error in granting the appellees' motion for summary judgment.

For the reasons stated above, the judgment of the Court below should be reversed with instructions to grant the injunction prayed for, or in the alternative, the cause should be remanded to the district court for consideration of the effect of Section 209 of the Housing and Rent Act of 1949 and the eviction regulations issued thereunder.¹⁰

Respectfully submitted.

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¹⁰ In *Woods v. Durr*, *supra*, the *per curiam opinion* of the Supreme Court was as follows:

"The motion of the Solicitor General for remand of this case is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for consideration of the effect of Section 209 of the Housing and Rent Act of 1949, approved March 30, 1949, and the eviction regulations of the Housing Expediter issued pursuant thereto." (17 U. S. Law Week 3298.)

APPENDIX

APPLICABLE PROVISIONS OF THE HOUSING AND RENT ACT OF 1947, 61 STAT. 193, 50 U. S. C. APP., SUPP. I, 1891-1899, AS AMENDED BY THE HOUSING AND RENT ACT OF MARCH 30, 1948, PUB. LAW No. 464, 80TH CONG.

SEC. 206. (a)¹ It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204 or otherwise to do or omit to do any act in violation of any provision of this title.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order

¹ This section was amended by section 203, Public Law 464, 80th Congress, to read as provided above. The original section read as follows:

"SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

"(b) Whenever in the judgment of the Housing Expediter any person has engaged in or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

EVICTIION OF TENANTS

SEC. 209. (a) No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless—

(1) under the law of the State in which the action or proceeding is brought the tenant is (A) violating the obligation of his tenancy (other than an obligation to pay rent higher than rent permitted under this Act or an obligation to surrender possession of such housing accommodations) or (B) is committing a nuisance in such housing accommodations or using such housing accommodations for an immoral or illegal purpose or for other than living or dwelling purposes;

(2)² the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations, or for the immediate and personal use and occupancy as housing accommodations, by a member or members of his immediate family, or,

² This subsection was amended by section 204 (a), Public Law 464, 80th Congress, to read as provided above. The original subsection read as follows:

“(2) The landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations.”

in the case of a landlord which is an organization exempt from taxation under section 101 (6) of the Internal Revenue Code, or the immediate and personal use and occupancy as housing accommodations of members of its staff: *Provided*, That in the case of housing accommodations in a structure or premises owned or leased by a cooperative corporation or association no action or proceeding under this paragraph or paragraph (3) to recover possession of any such housing accommodations shall be maintained unless stock in the cooperative corporation or association has been purchased by persons who are then stockholder-tenants in occupancy of at least 65 per centum of the dwelling units in the structure or premises and are entitled by reason of stock ownership to proprietary leases of dwelling units in the structure or premises; but this proviso shall not apply where such corporation or association acquires or leases such structure or premises after the effective date of the Housing and Rent Act of 1948 pursuant to a contract entered into prior to such date.

(3) the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser;

(4) ³ the landlord seeks in good faith to recover

³ This subsection was amended by section 204 (b), Public Law 464, 80th Congress, to read as provided above. The original subsection read as follows:

“(4) The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of substantially altering, remodeling, or demolishing them and replacing them with new construction, and the altering or remodeling is reasonably necessary to protect and conserve the housing accommodations and cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be

possession of such housing accommodations (A) for the immediate purpose of substantially altering or remodeling the same for continued use as housing accommodations, or for the immediate purpose of conversion into additional housing accommodations, and the altering, remodeling, or conversion cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be required by Federal, State, or local law for the alterations, remodeling, or any conversion planned, or (B) for the immediate purposes of demolishing such housing accommodations;⁴

(5)⁵ the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such; or

(6)⁶ the housing accommodations have been acquired by a State or any political subdivision thereof for the purpose of making a public improvement and are rented temporarily pending the construction of such improvement.

required by Federal, State, or local law for the alterations, remodeling, or any construction planned; or.”

⁴ Sec. 209 (a) (5) of the Housing and Rent Act of 1947 was repealed by section 204 (c), Public Law 464, 80th Congress. Prior to repeal, this subsection read as follows:

“(5) The housing accommodations are nonhousekeeping, furnished housing accommodations located within a single dwelling unit not used as a rooming or boarding house and the remaining portion of which is occupied by the landlord or his immediate family.”

⁵ This subsection was added by section 204 (d), Public Law 464, 80th Congress. See Footnote 4 for repeal of section 209 (a) (5) of the Housing and Rent Act of 1947.

⁶ This subsection was added by section 204 (d), Public Law 464, 80th Congress.

(b) Notwithstanding any other provision of this Act, the United States or any State or local public agency may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered: *Provided*, That nothing in this subsection shall be deemed to authorize the maintenance of any such action or proceeding upon the ground that the income of the occupants of the housing accommodations exceeds the allowable maximum unless such income, less any amounts paid to such occupants by the Veterans' Administration on account of service-connected disability or disabilities, exceeds the allowable maximum.

(c)⁷ No tenant shall be obliged to surrender possession of any housing accommodations pursuant to the provisions of paragraph (2), (3), (4), (5), or (6) of subsection (a) until the expiration of at least sixty days after written notice from the landlord that he desires to recover possession of such housing accommodations for one of the purposes specified in such paragraphs.

SEC. 302.⁸ Nothing in this Act or in the Housing and Rent Act, of 1947, as amended, shall be construed to require any person to offer any housing accommodations for rent.

RENT REGULATION FOR HOUSING ISSUED UNDER EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED

SECTION 6. Removal of tenant * * *

(b) *Administrator's certificate*.—(1) Removals not inconsistent with Act or regulation. No tenant shall

⁷ This subsection was added by section 204 (e), Public Law 464, 80th Congress.

⁸ This subsection was added by Public Law 464, 80th Congress.

be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law. The Administrator shall so certify if the landlord establishes that removals or evictions of the character proposed are not inconsistent with the purposes of the Act of this regulation and would not be likely to result in the circumvention or evasion thereof. Section 6 (b) (1) of the Rent Regulation for Housing, 10 F. R. 11666; 11 F. R. 12061.

RENT MEMORANDUM 6 (B) (1)—VI

Issuance of Certificate Where Landlord Proposes to Withdraw From Housing Use

Prior to Supplementary Amendment No. 7, effective on October 20, 1942, Section 6 (a) (6) permitted eviction where the landlord "seeks in good faith not to offer the housing accommodations for rent." By the amendment this was eliminated from Section 6 (a) (6) and the landlord's remedy now is to petition for a certificate under Section 6 (b) (1). Where the landlord in good faith desires to rent the premises for commercial as distinguished from housing purposes, a certificate should ordinarily be granted. Likewise, where the landlord in good faith desires to withdraw the accommodations from rent, does not propose to sell them, but proposes to leave them entirely vacant, a certificate should ordinarily be granted. However, in such a case the landlord's good faith usually must be substantiated by a serious economic motive indicating that the withdrawal is not temporary and that he does not seek to circumvent or evade the Act or Regulation. Special care should be used to ensure that the landlord's objection is not to dispossess the ten-

ant because the tenant has taken, or proposes to take, action authorized by the Price Control Act or the Rent Regulation.

(Issued October 14, 1942; revised May 15, 1943)
(Pike & Fisher OPA Rent Service Page 200:2151.)

INTERPRETATION 6 (B) (2)—VIII

Eviction for Purpose Other Than His Own Occupancy,
by Purchaser Who Buys After October 20, 1942

1. *Eviction prior to execution of sale contract*

L is renting a house to T. On or after October 20, 1942, L petitions for a certificate under Section 6 (b) (1) of the Housing Regulation on the ground that he wants to evict T in order to sell the house.

The petition will be denied. Eviction of the tenant under these circumstances is inconsistent with the purposes of the Act and the Regulation and is likely to result in the circumvention or evasion thereof. The conditions under which eviction of a tenant is permitted for occupancy by a purchaser are set out in Section 6 (b) (2) of the Regulation. The purposes of this provision require the denial of the petition in the above case. Pursuant to those purposes, a certificate will be issued where L desires to sell the house, only after a contract of sale has been made and the requirements of Section 6 (b) (2) are satisfied (Pike & Fisher OPA Rent Service Page 200:2166).

In the District Court of the United States, District
of South Dakota, Southern Division

Civil Action No. 609 S. D.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, FOR AND ON BEHALF OF THE
UNITED STATES, PLAINTIFF

v.

R. H. WEBER, DEFENDANT

PRELIMINARY INJUNCTION

Plaintiff's motion for a preliminary injunction came on for hearing before this Court on the 7th and 8th days of February 1949, and the Court having taken evidence, listened to argument of Counsel and having made its separate findings of facts and conclusions of law, and being duly advised in the premises;

Now, therefore, it is ordered, adjudged and decreed:

That the Defendant, R. H. Weber, his agents, servants, employees, attorneys, and all persons acting in concert and participation with the Defendant, be, and they are hereby enjoined during the pendency of this suit or until the further order of this Court, from:

(a) Removing or evicting, or attempting to remove or evict, or engaging in any action or course of action the purpose of which is to evict, any tenant from controlled housing accommodations, operating and managed by the said Defendant, located at 500 South Dakota Avenue, Sioux Falls, South Dakota, and commonly known as the Weber Apartments, upon any ground or for any purpose not expressly permitted by the Housing and Rent Act of 1947, as amended, or as hereafter amended, extended or superseded.

(b) Evicting, or taking or continuing and concluding, any steps, proceedings or actions to evict, remove or exclude from possession, any of the tenants of the housing accommodations hereinbefore described, operated and managed by the Defendant, where such steps, proceedings or actions are grounded upon certain written notices to vacate heretofore served upon the said tenants in the month of October, 1948, which said notices state that the landlord has in good faith contracted in writing to sell the housing accommodations to purchasers for the immediate and personal use and occupancy as housing accommodations by such purchasers.

(c) Soliciting, demanding, accepting or receiving any rent in excess of the maximum rent established and prescribed by the Housing and Rent Act of 1947, as heretofore or hereinafter amended, and by the controlled housing rent regulations adapted pursuant to said Act.

(d) Committing any violation of the above act or the Regulations issued thereunder, as heretofore or hereafter amended, extended or superseded.

Dated this 9th day of February 1949.

Enter:

A. LEE WYMAN,
Judge of the United States District Court.

Attest:

ROY B. MARKER,
Clerk.

[SEAL OF COURT]

By C. C. SCHWARZ,
Deputy.

(Indorsed.) Filed Feb. 9, 1949. Roy B. Marker,
Clerk. By C. C. Schwarz, Deputy.

United States District Court, District of Minnesota,
Fourth Division

2945, Civil

TIGHE E. WOODS, HOUSING EXPEDITER, ETC., PLAINTIFF

v.

DANIEL KRIZAN, DEFENDANT

MINNEAPOLIS, MINNESOTA, *February 15, 1949.*

Oral opinion by Judge Matthew M. Joyce. G. Frandle, Reporter.

OPINION

The COURT. In this action the plaintiff seeks a preliminary injunction enjoining the defendant and his agents from evicting any tenant of the housing accommodations described in the complaint upon any ground or for any purpose not expressly permitted by the Housing and Rent Act of 1947, as amended, and particularly expressed in Section 209 (a) of said Act.

A stipulation has been filed between the parties which was in the nature of an agreement as to the facts. Save for a few questions asked by the Court of the defendant yesterday, no evidence was taken. The question before the Court is one of law and a determination and proper application of Section 209 (a), and particularly the proper construction of paragraphs 3 and 5 of said section.

Paragraph 6 of the stipulation reads as follows: "That defendant admits that he is seeking to withdraw the housing accommodations from the rental market and evict the tenant in occupancy from the housing accommodations for the purpose of obtaining vacant possession in order to sell the housing accommodations."

The question then presented is can the defendant when proposing a sale proceed in accordance with the provisions of paragraph 5, Section 209 (a) or must he comply with paragraph 3 of said section. The general rule laid down in Section 209 (a) is that no one may evict any tenant in any court unless the landlord comes within one of the exceptions permitting eviction. There has been much said and much written on the subject before the court. The defendant relies in the main on *Woods v. Durr*, 170 Fed. 2nd, 976. That was a hardship case if there ever was one, and the court said: "The case thus presents the question whether Section 209 (a) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948 prohibits an eviction *under the circumstances of this case*. Those circumstances are, as the defendant readily admitted at the hearing, that she desires possession of her property in order that she may be in a better position to sell it to a purchaser who will occupy it as his home. She further asserted, and it was not denied, that the property in question is subject to an overdue mortgage in a substantial amount and that it will be necessary for her to sell in order to pay off the mortgage. There is no suggestion that the defendant's intentions with respect to the property are not entertained in good faith."

The most obvious difference between this case and the Durr case is that here there are 45 tenants who will be affected by the landlord's action. In the Durr case there was a single tenant. However, in any event I disagree with the interpretation of Section 209 (a) (5) adopted by the court in *Woods v. Durr* for the following reasons:

While professing to take the section to mean what it clearly says, the court does not do so. The section provides that a landlord can evict a tenant when he

“seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such.”

Quite clearly, this section contemplates the withdrawal of property from the rental market and the only possible way a landlord can give assurance that such will be the result of his action is for him to retain control of the property after the eviction. When the landlord seeks to evict a tenant while admitting an intent to sell the property, he admits and makes manifest the fact that he will be in no position to carry out the purpose which he avows. It seems a contradiction to say that a landlord can evict for the purpose of withdrawing accommodations from the rental market and then as proof of his good faith allege an intention which shows that he will be in no position to effectuate his avowed purpose. Even if the landlord sells with the honest intention that the property shall not thereafter be offered for rent he is in no position to bind his grantee in this respect.

While Section 209 in Paragraph 3 expressly gives the landlord the right to evict a tenant after sale of the property, there is nothing in the section itself which indicates that he shall have the right to evict before and for the purpose of sale, and I do not think this can be properly read into paragraph 5.

In the *Durr* case the court relied greatly upon the legislative history of paragraph (5), but nowhere in that history was it intimated that paragraph 5 was intended to permit an eviction before sale. Furthermore, neither the committee reports nor the statement of Senator Cain gave any indication that paragraph 5 was intended to implement or extend paragraph 3 which permits eviction after sale of the property. The

court in the *Durr* case also pointed to the fact that Section 302 gave assurance that no landlord would be required by the Act to keep his housing accommodation in the rental market and said that paragraph 5 was designed to implement that assurance by making it possible for a landlord whose housing accommodation was in the rental market to withdraw it therefrom. I think the foregoing sentence is an accurate statement of the purpose and consequences of Section 302 and paragraph 5 of Section 209. But to say that paragraph 5 was intended to provide the means by which a landlord could withdraw his property from the rental market with the understanding that such property would not thereafter be offered for rent is not to say that it was intended to provide the means by which the landlord could recover possession for the purposes of sale. I do not think the latter proposition follows from an acceptance of the first. Nor can I find anything in the legislative history, or the language used by Congress, which would warrant such an extension of the meaning of paragraph (5). To the contrary, if the words used in paragraph (5) are given their plain and logical meaning that paragraph is perfectly consistent with the provisions of paragraph (3), which is not true of the construction adopted by the court in the *Durr* case.

Consider for a moment one possibility arising out of the *Durr* case. If a landlord can evict for the purpose of sale, it is clear that the possibility of a violation of Section 209 (a) (5) is thereby increased. This necessarily follows from the fact that a landlord who proposes to sell is in no position to vouch for the intentions of the buyer, and it may well be that the latter wishes to rent the property. In so doing the new owner would be violating the law, and it would then be the duty of the Housing Expediter to stop this

violation. Assuming for the moment that the Expediter could stop a violation by the buyer, the Expediter would be placed in the ridiculous position of enjoining the rental of vacant premises during a period of housing shortage, thereby making more acute a condition the Housing Act was designed, in part, to alleviate.

For this reason, I think Section 209 (a) (5) should be given a restrictive interpretation and that a more substantial showing of good faith should be required than a mere allegation of intent to sell the housing accommodation. Nowhere is there withdrawal of Section 3 by Congress expressed or implied. Surely one restriction in 209 (a) was not put in the law to eliminate another restriction of equal force and purpose. Section 3 was in the law before Section 5 was in it and has remained undisturbed in its original text throughout the various changes and amendments. Paragraphs 3 and 5 can be enforced without destroying each other.

I am of the opinion that in order to have rent controls effective there must be accompanying eviction controls. The restrictions were imposed by Congress. Its objectives and purposes are to be construed and determined by a reasonable interpretation of its language. It devoted a whole division of the Act to the very important subdivisions labeled "Eviction of Tenants," and known as Sections 209 (A), (B), (C). I think paragraph 3 of 209 (a) has just as much importance as the paragraphs numbered 1 to 6, of which it is a part. Why should I disregard paragraph 3 when I think Congress gave it a meaning and importance which I cannot in good conscience disregard.

I have read Judge Sanborn's opinion in the Hillcrest case. There certainly is nothing in that opinion that would vary or in any manner affect or influence

the determination or decision which I have reached in this case. If anything, I think it lends support to it. I see no purpose in calling further attention to *Woods v. Durr* except to say that in the last paragraph thereof the court takes time to say "We hold, therefore, that if a landlord seeks to recover possession of his housing accommodations for the immediate purpose, entertained in good faith, of withdrawing them * * *," "what such a landlord proposes to do with his accommodations is wholly immaterial provided he understands and intends in good faith that they shall not, at least so long as Section 209 (a) (5) of the Act remains in force, again be offered for rent."

I think that decision was rendered in the light of the facts and circumstances before the court and it was limited to the case then presented before it.

A preliminary injunction will issue as I find that the defendant has not in good faith sought to withdraw the housing accommodations from the rental market within the meaning and intent of the Act, and as suggested yesterday, if the defendant wants it, I shall of course be glad to include any provisions that will permit him to show the quarters that he owns and desires to sell and anybody who violates that injunction will be back here in court for contempt.

Mr. Dim, you may present an order in accordance with the views expressed by myself in the opinion I have just delivered.

* * * * *

MEMO RULING DENYING MOTION FOR NEW TRIAL

No. 874304

In the Municipal Court, City of Los Angeles,
County of Los Angeles, State of California.

Thomas B. Holt and *Rosemary E. Holt*, plaintiffs,
v. *Marie Lonergan*, defendant.

In support of their motion for a new trial from my decision in favor of the defendant in this action of unlawful detainer (see Memorandum Decision filed October 25, 1948, L. A. Daily Journal Reprint No. 1355 from issue of October 30, 1948), plaintiffs rely particularly on the case of *Woods v. Durr*, decided by the Third Circuit Court of Appeals of the United States on November 8, 1948.

In *Holt v. Lonergan*, *supra*, I held that the actual intent of a landlord to withdraw one of his apartments from the rental market and to refrain from rerenting it as housing accommodations for the duration of federal price control is insufficient to meet the statutory requirements of "good faith" in Section 209 (a) (5) of the Housing and Rent Act of 1947, as amended, where the landlord's real or dominant reason for taking the apartment off the market was to secure the ouster of a tenant he disliked. In *Woods v. Durr*, the court stated: "What such a landlord proposes to do with his accommodations is wholly immaterial provided he understands and intends in good faith that they shall not, at least so long as Section 209 (a) (5) of the Act remains in force, again be offered for rent as housing accommodations by him or any subsequent owner."

It is apparent, therefore, that if *Woods v. Durr* correctly interprets Section 209 (a) (5), *supra*, my decision in *Holt v. Lonergan* is erroneous, and the motion for new trial should be granted.

The decision of so high and respected a court as the Third Circuit Court of Appeals is entitled to great weight and ordinarily would be followed by me, particularly when determining a question of federal law. The opinion of that Court takes on added significance by reason of the fact that it was authored by Judge Maris, who previously had served as Chief Judge of

the Emergency Court of Appeals of the United States, established under the Emergency Price Control Act of 1942 for the purpose of passing upon price and rent control questions arising under the federal legislation. On the other hand, however, I am advised that the Office of Housing Expediter, through the Solicitor General, is filing a petition for certiorari in the United States Supreme Court to secure a review of the Circuit Court's decision in *Woods v. Durr*. In addition, the ruling of the Eighth Circuit Court of Appeals in *Woods v. Hillcrest Terrace Corporation*, decided December 6, 1948, and not yet reported in Federal Reporter, has some implications contrary to the holding in *Woods v. Durr*.

Since the decision in *Woods v. Durr* has not found acquiescence as yet in the Office of Housing Expediter and because of the importance of the question to the defendant in this action, I therefore shall exercise my honest judgment as to whether the reasoning of the court in *Woods v. Durr*, is, in my opinion, sound and shall rule upon the motion for new trial on that basis.

In *Woods v. Durr*, the Circuit Court considered as true the fact that the defendant landlord was seeking eviction of the tenant under Section 209 (a) (5) for the reason that she desired to sell the property and would be in a better position to sell the property if it were vacant. In upholding the landlord's right to evict for the purpose of sale by withdrawal of the housing accommodations from the rental market, the Court relies primarily upon Section 302 of the Housing and Rent Act of 1947, which was added by 1948 amendment and which provides:

Nothing in this Act or in the Housing and Rent Act of 1947, as amended, shall be construed to require any person to offer any housing accommodations for rent.

Judge Maris, in *Durr v. Woods*, also relies on *Taylor v. Bowles*, 145 F. 2d 833, decided by the Emergency Court of Appeals in 1944. In the *Taylor* case, the Court held that, under Section 4 (d) of the Emergency Price Control Act of 1942, which was substantially identical with Section 302, *supra*, of the Housing and Rent Act of 1947, as amended, a landlord might withdraw his housing accommodations from the rental market merely because of dissatisfaction with the existing maximum rents. The Court in that case also referred to the fact that the landlord preferred leaving his apartments vacant rather than continuing to rent them at existing ceilings and that if, after lapse of a temporary period, he did not succeed in securing an upward revision of the ceilings, he intended to dispose of the apartment house.

Reliance is also placed by the court in *Woods v. Durr*, *supra*, upon the legislative history of Sections 302, *supra*, and 209 (a) (5) in arriving at its ultimate conclusion.

After giving due consideration to Judge Maris' discussion of Section 302 of the Housing and Rent Act, of *Taylor v. Bowles*, *supra*, and of the legislative history of Sections 302 and 209 (a) (5) of that Act, however, I am unable to concur with the reasoning or holding of the court in *Woods v. Durr*, *supra*, for the following reasons.

First, Section 302, read literally, pertains only to property not already occupied by a tenant. Thus a landlord may not be required "*to offer any accommodations for rent.*" [Italics added.] But such a provision neither by express term nor by necessary implication applies to a situation wherein the landlord previously has offered his premises for rent and has a tenant already in occupancy. Having submitted his property to a rental use at a time when a war emer-

gency arose and continues to exist, requiring in Congressional judgment the imposition of restraints upon the eviction process, the landlord and his property are subject to lawful and reasonable regulation within the purview of the federal Constitution. These Congressional restraints upon the eviction process are found in Section 209 of the Housing and Rent Act of 1947, as amended, and appear in the form of a general restraint upon eviction so long as the tenant lawfully abides by the obligations of his tenancy, which general restraint is subject to a few enumerated exceptions found in the subparagraphs of Section 209 (a). It is necessary, therefore, for a landlord whose property is presently occupied by a tenant under rent control to bring himself within one or more of the enumerated exceptions in order to evict the tenant. But Section 302, having reference to property which is not tenant-occupied, should have no influence upon the construction of these exceptions to the restraint upon eviction. Certainly a decided distinction both in fact and in constitutional effect exists between compelling a property owner who is not renting his premises to put them on the rental market and in prohibiting one who has already created a landlord-tenant relationship, to terminate that relationship, and in my opinion Section 302 relates only to the former situation.

What I consider to be the same confusion and failure to distinguish between the independent functions of Sections 302 and 209 runs through the Circuit Court's discussion of the legislative history of these Sections in *Woods v. Durr, supra*. The legislative history therein recited clearly indicates that each of the new sections added by Congress in 1948 serves a different purpose. Section 302 provides that a landlord shall not be required to rent his premises if they are vacant, and this should be so whether the premises

have never before been tenant-occupied or whether they have been voluntarily vacated by the tenant. While Judge Maris states that Section 302 must have been incorporated for the benefit of those owners whose property was in the rental market because "those owners whose accommodations were not in the rental market were not subject to the Act at all and accordingly had no need of Section 302," I believe this argument overlooks the obvious need or place for such a provision with reference to accommodations already subjected to rent control, but which have become vacant either by resort to lawful legal process or by voluntary action of the tenant. In the latter situation, Section 302 would operate to enable the landlord to decline to rerent the premises, if he so desired.

It is true that the legislative history of Section 209 (a) (5) and the clear import of the language in that subparagraph gives the landlord the right, where he is acting "in good faith," to withdraw his property from the market while it is tenant-occupied. But nothing that I read in the Committee reports or in Senator Cain's remarks on the floor of the Senate indicates a Congressional intent that a landlord may withdraw his property from the rental market and evict the tenant then in occupancy solely for the purpose of facilitating the salability and to increase the sales price of the premises.

But the most serious objection I have to the decision in *Woods v. Durr, supra*, is to be found in the court's construction of the last clause of Section 209 (a) (5). This subparagraph permits eviction if:

the landlord seeks in good faith to recover possession of such housing accommodations for the purpose of withdrawing such housing accommodations from the rental market, *and such housing accommodations shall not there-*

after be offered for rent as such. [Italics added.]

Woods v. Durr explicitly recognizes that the withdrawal of the property from the housing rental market must be "permanent," i. e., for the duration of federal controls. The court also states that, after withdrawal by a landlord pursuant to Section 209 (a) (5), the premises may not "again be offered for rent as housing accommodations either by him or any subsequent owner." [Italics added.]

The reason for the courts construing the last clause of Section 209 (a) (5) as binding on a subsequent purchaser of the property is obvious, for without such a restriction, it is apparent that a means for wholesale evasion of the restraint on eviction imposed by Section 209 would exist. But any degree of reflection upon the effect of such an interpretation should lead to the conclusion that, as so construed, Section 209 (a) (5) well might be held unconstitutional as applied to the subsequent purchaser.

Thus, for example, we would have a common situation arise where one would purchase a house or structure, obviously intended for housing accommodations, standing vacant, with no actual knowledge that the house had been withdrawn from the rental market, with no constructive knowledge even that the premises had been tenant-occupied which could arise by the fact of tenant-occupancy as of the date of purchase of the property, and nothing of record under the recording statutes to put the purchaser on constructive notice of the fact of withdrawal from the rental market. To hold, under such circumstances, that a *bona fide* purchaser for value could subsequent to his purchase be prohibited from renting his property raises in my mind so serious a question of constitutionality that, in accordance with well-established

canons of interpretations, such a construction should be avoided. If, on the other hand, the court should find such a construction to be the meaning intended by Congress, then, in my opinion, should the last clause be held unconstitutional as applied to the subsequent purchaser, the entire exception found in Section 209 (a) (5) would fall, for Congress surely could not have intended that the exception should remain in effect if the clause prohibiting rerental of the property is invalid.

It is true that at least one Federal District Court has tried to meet this objection by permitting eviction by withdrawal pursuant to Section 209 (a) (5) for the purpose of sale, but by requiring the landlord through injunctive process to place in any deed conveying the property a covenant against renting the property for housing accommodations. Such a remedy, of course, could only be partially effective, for it would be binding only on the owner who was a party to the injunction suit and could have no restrictive effect on sales of the property subsequent to the one effected by the owner subject to the injunction. In addition, even the partial remedy afforded by injunction could not be awarded by most courts in which the eviction proceedings would be maintained, for such courts as the Municipal Courts in California, which hear practically all such cases, have no equitable jurisdiction to issue injunctions.

Obviously, therefore, the only way for the prohibition against rerenting of the premises for housing accommodations to be effective is for the property to remain in the landlord who avails himself of the right to evict conferred by Section 209 (a) (5), *supra*. As so construed, Section 209 (a) (5) would not, in my opinion, be unconstitutional.

Generally speaking, the Housing and Rent Act of 1947, as amended, does not prohibit a landlord from selling his property at any time. True, the fact that he may have a tenant in the premises may make sale more difficult and may reduce the price for which the property may be sold. But, as stated by the United States Supreme Court in *Bowles v. Willingham*, 321 U. S. 503, at pages 517, 518: "Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But as we have pointed out in the *Hope Natural Gas Co.* case (320 U. S. p. 601), that does not mean that the regulation is unconstitutional. * * * A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power."

In order partially to relieve the landlord from the effect of the general restraint on eviction when he wishes to sell his property, Congress enacted Section 209 (a) (3), which permits a landlord to evict a tenant if:

the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser.

Apart from this exception, eviction for purpose of sale is not expressly authorized by any other of the exceptions enumerated in Section 209 (a), *supra*. To permit the landlord to evict through resort to Section 209 (a) (5), for the purpose of sale, without reference to the necessity for owner-occupancy by the purchaser of the premises, obviously would enable any landlord to avoid the restrictions implicit in Section 209 (a)

(3). So far as the existing landlord is concerned, he has no real concern with the use to which the property is put after sale by him. Consequently, if as I have concluded, no provision appears in Section 209 (a) (5) which can constitutionally be invoked to impose upon subsequent bona fide purchasers the restraint against rerenting the premises for housing accommodations, it follows that not only would Section 209 (a) (5) secure no additional objective under the rent act but would enable a landlord to evade the restrictions implicit in Section 209 (a) (3), *supra*.

As I read the Act the landlord's rights to sell his property which is subject to rent control are as follows: A landlord may either sell his property at any time without evicting the tenant, or he may evict the tenant for the purpose of sale if he has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser, as provided in Section 209 (a) (3), *supra*. If, however, he elects to withdraw his property from the rental market, he cannot do so if he intends to secure the vacancy for the purpose of selling the property; in such a situation, he is attempting to use the ground for eviction contained in Section 209 (a) (5) for the purpose of evading another provision of the Act, i. e., Section 209 (a) (3), and therefore is not acting "in good faith" as required by Section 209 (a) (5). The reason or motive for the landlord's resorting to Section 209 (a) (5), therefore, is material, contrary to the holding in *Woods v. Durr, supra*.

I already have set forth in some detail a number of proper objectives which a landlord could have in availing himself of the withdrawal procedure authorized by Section 209 (a) (5), in my memorandum decision in this case filed October 25. I believe these reasons

which are consistent with the meaning of the words "in good faith," as used in Section 209 (a), *supra*, afford sufficient and the motivating grounds for the enactment of Section 209 (a) (5), and that my conclusion does not emasculate this ground for eviction into meaningless phraseology. If, however, the landlord wishes to evict a tenant so as to bring himself within the restrictions of Section 209 (a) (5) for the benefits he elects to secure by this withdrawal procedure, having voluntarily subjected himself to such restraint, in order to secure a desired benefit, he may not complain that any restraints on his right of alienation or sale result in an infringement of his Constitutional rights. (See *In re Tenner*, 20 Cal. 2d 670, at p. 674.)

With respect to the case of *Taylor v. Bowles*, *supra*, relied upon in *Woods v. Durr*, *supra*, I am of the opinion, first, that that holding has no application to the construction of Section 209 (a) (5) because no such legislative plan as that created by Section 209 of the Housing and Rent Act of 1947, as amended, was involved in the *Taylor* case, and secondly, because that case does not directly hold that withdrawal for purpose of sale was proper. On the contrary, in discussing the impact of its decision on the Emergency Price Control Act of 1942, the Emergency Court of Appeals indicated it felt its decision would have little effect upon the rent control situation and expressly stated that to permit an occasional and obstinate landlord to withdraw his premises from the rental market would not result in a general landlords' strike.

If, of course, the use of premises withdrawn from the rental market pursuant to Section 209 (a) (5) is as limited as I have indicated in my original decision, it is true that that ground for eviction will be used but occasionally and only where the actual necessity

for this type of relief exists. If, however, Section 209 (a) (5) is construed to permit eviction and withdrawal for the purpose of sale, it would become a ready instrument for a type of eviction not contemplated nor intended by Congress, and which could result only in the utmost confusion when the property reached the hands of subsequent purchasers.

For the foregoing reasons, I believe the case of *Woods v. Durr* erroneously holds that the use to which the landlord intends to put his accommodations, following the eviction of the tenant-in-occupancy, is immaterial. Furthermore, there appears to be no discussion in *Woods v. Durr* of the meaning of the phrase "in good faith" as used in Section 209, *supra*, nor of the cases construing that term, nor of the reason for the Congress having engrafted it as a condition in Section 209 (a) (5).

The motion for new trial is denied.

Dated December 24, 1948.

DANIEL N. STEVENS,
Judge.

BALTIMORE CITY COURT
Filed January 26, 1949

SAMUEL FOX

v.

WALTER ROBERTSON

JAMES F. MILLER ET AL.

v.

MRS. MARY SHAMBURGER

MARYLAND STATE HOUSING CO.

v.

ETHEL WISNER

Jack M. Fox for Samuel Fox, plaintiff.

Walter Robertson, defendant, in proper person.

F. Duncan Cornell for James F. Miller et al., plaintiffs.

Mrs. Charles Shamburger on behalf of Mrs. Mary Shamburger, defendant.

Jesse Spector for Maryland State Housing Co., plaintiff.

Ethel Wisner, defendant, in proper person.

Thomas E. Barrett, Jr., Area Attorney for U. S. Housing Expediter, as *amicus curiae* in all three cases.

NILES, J.:

The present three cases, on appeal from the People's Court, were all decided in favor of the tenants of residential properties in suits brought by the landlords to evict them. The Court heard testimony separately in each case, and then heard argument in all together. In each case the landlord served on the tenant a notice to quit, bearing a notation which is substantially a copy of the words of the Housing Act of 1947 (as amended to 1948), section 209 (a) (5), as follows:

The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not be thereafter offered for rent as such.

The first case is that of *Samuel Fox v. Walter Robertson* and concerns the property 606 North Brice

Street. Mr. Fox, one of the landlords, testified that what he wants to do is get the tenant out, improve the property and sell it; he does not intend to rent it, but he has no contract of sale, either written or oral.

The second case is that of *James F. Miller et al. v. Mrs. Mary Shamburger* and concerns the property 2833 Miles Street. Both of the owners of the property testified that they had no definite plans as to what they were going to do with the property. They may sell it, they may use it for some purpose other than residential but they know they cannot rent it; and they do not intend to rent it.

The third case is that of *Maryland State Housing Company v. Ethel Wisner* and concerns the property 3361 Falls Road. Mr. Kaufman, president of plaintiff corporation, testified that he wants to get the tenant out, that he wants to make some repairs or improvements, and that he does not want to raise the rent, which he thinks is fair.

The problem is whether this Court should follow a decision of the People's Court, dated September 22, 1948, in the case of *Property Service Co., Agent v. John Spicknall*, in which case Judge Hennegan wrote an opinion concurred in by the other judges of that Court and which was published in *The Daily Record* of September 24, 1948. In that case a landlord sought to evict a tenant in order to have an empty house for sale, but he did not have a written contract with any purchaser. Judge Hennegan held that the landlord was not entitled to evict the tenant under section 209 (a) 5.

The case of *Woods v. Durr*, 170 F. 2d 976, decided by the United States Court of Appeals for the Third Circuit on November 3, 1948 (No. 9811), is cited by the landlords as being a later case and of much higher authority. In that case three Judges of the

U. S. Court of Appeals came to the opposite conclusion, namely, that a landlord has the right to evict a tenant if, in good faith, the landlord intends not to rent the house again, but merely to hold the building off the market until it is legal to rent it or to sell it to anyone without restriction.

Cases to the opposite effect have been cited by Mr. Barrett, Area Attorney for the U. S. Housing Expediter, who appeared as *amicus curiae*. They are *Woods v. Seaton*, — F. 2d —, decided by the U. S. District Court for the Eastern District of Virginia on October 26, 1948; *Woods v. Hillcrest Terrace Corp.*, 170 F. 2d 780, decided by the U. S. Court of Appeals for the 8th Circuit on December 6, 1948; *Woods v. Taper*, 79 F. Supp. 984, decided by the United States District Court for the Southern District of California on July 27, 1948; *Woods v. Cammett*, 80 F. Supp. 636, decided by the United States District Court for the District of New Hampshire on October 19, 1948; *Woods v. Palumbo*, 79 F. Supp. 998, decided by the U. S. District Court for the Middle District of Pennsylvania on September 17, 1948. None of the authorities cited are binding on this Court.

The reasons supporting the respective conclusions are very well summed up in Judge Hennegan's opinion in the *Spicknall* case on the one hand, and Judge Maris' opinion in the *Durr* case on the other.

My view is this: that the basic object of the Housing Act is to protect tenants against increases of rent, which may be caused either by direct increases in existing tenancies, or by reflections of increased prices at which houses are sold.

There is an express provision in the Housing Act, namely, section 209 (a) 3, which applies to sales, and that section is the only specific provision regard-

ing sales. It provides that unless a landlord has a written contract of sale with a specific purchaser who intends to occupy the house himself, the landlord is not entitled to evict the tenant on the ground that he desires to sell. In the present cases none of the landlords has a written contract of sale of that sort.

The landlords all contend that they are entitled to evict, because they all comply with the exact words of the statute, in that they seek, in good faith, to recover possession of the housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations will not be offered for rent as such. I find great difficulty in understanding just exactly what these words mean; I find more difficulty in imagining how they can be enforced. But I do not have to construe them, because, it seems to me, Judge Hennegan's reasoning in the *Spicknall* case is correct in deciding that in cases of sale, subsection 3, rather than subsection 5, governs.

In view of the fact that the *Durr* case in the Court of Appeals for the Third Circuit may find its way to the Supreme Court, it might be suggested that the Court delay its decision until the Supreme Court has decided the question. I do not think that that would be advisable. If the Supreme Court affirms the *Durr* case, the landlords can bring new suits, and the only thing lost is the minor matter of costs. In the meanwhile, however, the situation would be unsettled in Baltimore. Since the cases are here, and have been fully heard and argued, they should be disposed of now.

I agree with what Judge Hennegan says in the *Spicknall* case, and think that I cannot state it better than he did. For the reasons stated in Judge Hennegan's opinion, therefore, I affirm the decisions of

the People's Court, and render judgment for the defendant in each case.

PEOPLE'S COURT OF BALTIMORE CITY

Filed September 22, 1948—Case No. 11906-48

PROPERTY SERVICE Co., AGENT

v.

JOHN SPICKNALL, 307 EAST LANVALE STREET

Housing and Rent Control Act of 1948—Notice to
Repossess Premises and Terminate Tenancy—
Judgment for Defendant

HENNEGAN, J.:

On April 5th, 1948, the plaintiff as Agent of the R-5 Construction Company, owner of the premises in Baltimore City, known as No. 307 E. Lanvale Street, sent a notice to its tenant, the defendant, advising the latter of its intention and desire to repossess the premises and terminate the tenancy as of August 12th, 1948, and gave as a reason for such termination of tenancy that:

the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such.

which reason follows the wording of Section 209 (a) (5) of the Housing and Rent Control Act of 1948.

Surrender of possession of the property was not made at the expiration of the notice and as a result this case was instituted and in compliance with a rule of this Court a pretrial affidavit was made on behalf

of the owner which recited that the reason for the eviction was:

it wants an empty house so that it can sell it as such.

At trial the plaintiff adopted as its testimony in the case the averment of the pretrial affidavit and urged that same was sufficient in law to entitle it to a judgment of restitution of the premises under Section 209 (a) (5) of the Housing and Rent Control Act of 1948.

The determination of the case rests solely upon the legal interpretation of the above section of the Act of 1948 and whether in the enactment of same Congress intended to grant landlords an *additional* right of eviction for purposes of sale of property, as a right of eviction in case of sale had already been granted by Section 209 (a) (3) of the Act of 1947.

Any attempt to ascertain legislative intent regarding an act much encompass due consideration of the purposes and circumstances dictating its enactment, together with a careful study of the context of the act in question. With this in mind it might be well to briefly review the history of the rent-control legislation involved in this case.

At the very outset of the war it became apparent that legislation to regulate prices and rents was necessary to control the acute shortage of commodities and housing accommodations. Congress, aware of this situation, passed the "Emergency Price Control Act of 1942" on January 30, 1942, when the war was less than two months in duration. The Act clearly sets forth its purposes in these words:

and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted and abnormal increases in rents and prices.

Amendments to the Act was made from time to time, the last being in 1948 and with this latter amend-

ment the Court is now concerned. It is reasonable to assume that in terminating rent control in certain areas and retaining control in other areas that Congress felt in these areas where controls are retained (such as the Baltimore area) that the same reasons exist for control that existed at the time of passage of the Act in 1942. Otherwise rent control would have been terminated in all areas.

It is needless to say more of the purposes and circumstances surrounding the passage of the Act of 1948, than to repeat that the temper of the legislative mind at that time was to control housing and not to invite speculation therein.

With this understanding of the purposes for control legislation over housing accommodations the Court has made a careful study of the language of the several acts and amendments thereto, so as to arrive at a logical interpretation of the terms of Section 209 (a) (5) as applied to the pending case.

The 1948 Act is in the main amendatory of the Act of 1947 wherein under Section 209 (a) (1), (2), (3), (4), and (5) was set forth the permissible causes for eviction of tenants. By Section 209 (a) (3) eviction of tenants was permitted when:

the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations for such purchaser.

The Act of 1948 while amending other subsections of Section 209 (a) by specific reference to such subsections and by either additions thereto or eliminations therefrom did not disturb the wording of subsection (3) by the deletion or addition of a single word. Consequently the conclusion to be made is that subsection (3) amply provided the means for

eviction of tenants for the purpose of effecting sales of property and that Section 209 (a) (5) providing:

the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such

was inserted as a separate and independent subsection and was never intended to limit or broaden the language of other subsections of the act. It was intended to apply to causes not otherwise provided for in the act. It would be as sensible to urge that Section 209 (a) (5) in some manner was to extend or revise the reasons for eviction of tenants set forth in the other subsections of Section 209 as to say that it was intended to enlarge upon eviction for purpose of sale of property as set out in subsection (3).

The last portion of Section 209 (a) (5) provides as follows:

that such housing accommodations shall not thereafter be offered for rent as such.

This, in the opinion of the Court, excludes the idea of sale and contemplates retention of ownership in the landlord and gives weight to the contention that this section was not to be used where sale of property was involved. Unless this be so, the words

“Shall not thereafter be offered for rent” as housing accommodations would have little meaning because a purchaser from the landlord, not bound by his affidavit, could offer the property for rent, contrary to the terms of the act. While enforcement is ordinarily not a function of the Court, nevertheless, when the Court, in the construction of the terms of a Statute can give force and effect to the words of the Statute,

it is bound to do so. In this case it must support statutory law and give it full power and effect by denying eviction where it appears that the property is taken from the rental market for purpose of sale.

To apply any other interpretation to Section 209 (a) (5) of the Housing and Rent Control Act of 1948 would be contrary to the purposes of the Act, would distort its language and lead to illegal eviction of tenants with subsequent speculation in vacant housing accommodations which the legislative branch of the Federal Government had hoped to prevent.

In a recent injunction case filed in the District Court of the United States, Southern District of California, Central Division, by Tighe E. Woods, Housing Expediter, vs. Sydney Mark Taper, where the similar facts existed as in the instant case, the Court held that Section 209 (a) (5) did not apply where the sole reason for eviction was to secure a vacant house for sale.

For the reasons above set forth the Court feels that the plaintiff herein is not entitled to restitution of the premises mentioned and will therefore enter a judgment for the defendant.

The Court having decided this case on an interpretation of Section 209 (a) (5) of the Housing and Rent Control Act of 1948 does not find it necessary to pass upon the question of whether the plaintiff is a proper party plaintiff, especially since the question was not raised at trial.

There are now pending in this Court a number of cases whose decision presents the identical question involved in this case. There are literally hundreds of potential suits based upon withdrawal of premises from the rental market. As the question will certainly be presented to the Baltimore City Court on appeal, it has been considered proper that the reason-

ing upon which this decision is based be expressed in a written opinion for the information of all concerned.

Each of the other Judges of this Court concurs in this opinion. There are thirty-seven cases, each involving this question, and held *sub curia* by the Judges of this Court, that have been today decided for the defendants in accordance with this opinion.

In the District Court of the United States for the
Western District of Missouri, Western Division

No. 5192

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, PLAINTIFF

v.

RUTH ALEXANDER AND OPAL BAKER, DEFENDANTS

MEMORANDUM

On motion for summary judgment, the following undisputed facts appear from the pleadings, affidavits and agreements made at pretrial conference. No other facts material to the issues appearing to be in dispute between the parties, the matter is now, by agreement of parties, submitted to the court for decision.

The housing accommodations involved in this action is controlled housing within the purview of the Housing and Rent Act of 1947, as amended. Said housing accommodation is a 6-apartment building located in Kansas City, Missouri, owned by Ruth Alexander, a single woman, and until the occurrence hereinafter mentioned was rented and occupied by various tenants of Ruth Alexander. November 19, 1948, defendant Alexander executed and recorded a written declaration in which it was declared that she "desires to

sell separate interests in said property and for such purpose does * * * subject * * * described real estate to the restrictions, agreements, covenants, charges and assessments" set forth therein. By said declaration, each apartment in the premises is deemed a "private apartment" and defined as consisting "of the living quarters therein, together with the floors, * * * and other parts of said building wholly within said private apartment." Tersely stated, the land, outer structure, entranceways and halls in this building located on said premises are specifically designated "common property" and all parts thereof "except such as are part of the private apartment" are so dedicated. By the declaration, the legal title to the property is "divided into six (6) equal parts," and each interest consists "of an undivided one-sixth ($\frac{1}{6}$ th) interest in and to all the common property and all of one private apartment." "Each owner of an interest as above set forth (is) entitled to the sole and exclusive possession and occupancy of the private apartment * * * subject to existing tenancies" and under certain specified terms and conditions set forth in the declaration "entitled to the free use of the common property." In the declaration, Ruth Alexander is "designated and appointed as sole Managing Trustee for said property, until all apartment units have been sold and conveyed, and until her successor is appointed." Provision is therein made as to how a successor trustee may be appointed and the duties and obligations of such trustee are outlined in said instrument. The trustee is required to give bond, operate the apartment building and authorized to levy and receive from the coowners the amount of monthly assessments necessary to defray the cost of the operation of the premises. Coowners defaulting for thirty days to make payment of any assessment

are subject to having the utilities to their private apartment discontinued, and if such default continues for forty-five days, required to vacate the private apartment, and failing peaceably to do so, are liable to eviction action at the hands of the trustee. Upon vacation of an apartment, the trustee is authorized to rent the same and collect the rent therefrom until the default is cured; whereupon the vacated owner's rights are reinstated, subject to the then tenancy of the apartment. Each interest conveyed descends "in the same manner as any other interest in real estate, subject to all easements, reservations, restrictions, liens and encumbrances of record, and to the terms and conditions of (the) declaration."

Prior to the execution of such declaration, defendant Alexander caused notice of eviction to be served upon certain of the then tenants in said housing accommodation, stating as grounds therefor that the particular apartment was to be permanently removed from the rental housing market. After the execution of the declaration, she proceeded to sell separate "private apartments" in said premises. Pursuant to said plan, a formal written contract for the sale of each private apartment sold was entered into between defendant Alexander and the purchaser thereof, as manifest in Exhibit 2 herein. Four (4) such apartments having been sold, the tenants therein vacated the same and the purchasers of said apartments are now in possession thereof. As to the remaining two (2) apartments, no notice to evict has ever been served on one of the tenants therein. As to the other remaining apartment, notice to evict was served before any formal written contract for the sale of that apartment was executed by the defendant Alexander. The apartment last referred to is now occupied by tenant Harry L. Israel, Jr. On May 25, 1948, defendant

Alexander entered into a written contract of sale with her codefendant, Opal Baker, covering the apartment occupied by tenant Israel. The transaction, the subject matter of that contract of sale, has never been consummated. After the bringing of this action, said contract, by mutual agreement between the parties thereto, was cancelled and the earnest money deposited on the purchase price thereunder has been refunded to the defendant Opal Baker. Defendant Alexander intends to evict tenant Israel, now occupying said apartment, and sell such apartment to some other purchaser. She offered to sell said apartment to such tenant prior to serving notice of eviction to him.

No corporation has been formed to hold title to the property in question. No certificate of stock evidencing interest in said property, has ever been issued. Title to the several apartments located in the premises involved vests in the purchaser in accordance with the terms of the above-referred-to declaration, Exhibit 1 herein.

Under the foregoing facts, this action was instituted by plaintiff to enjoin defendants from evicting tenant Harry L. Israel, Jr., from the controlled housing accommodation now occupied by him under the notice of eviction above referred to. The theory upon which plaintiff premises this action is that the acts and conduct of defendant Ruth Alexander, in executing the declaration aforesaid and selling "private apartments" in the housing accommodation in question, merely creates "proprietary leases" of such apartments and is an attempted evasion of the cooperative proviso contained in *Section 209 (a) (2) of the Housing and Rent Act of 1947, as amended*, and that the giving of said notice of eviction to said tenant was not made in good faith for the purpose of permanently withdrawing said housing accommoda-

tion from the rental market and is, therefore, in violation of subsection (5) of Section 209 (a), *supra*.

From the foregoing, it is evident that so far as defendant Opal Baker is now concerned in this litigation, the cause of action here attempted to be asserted against her has become moot. The parties are in agreement that the contract under which she sought to purchase the "private apartment" in question has been cancelled and that she has no further interest in the housing accommodation here involved. As a consequence, the granting of relief here prayed, so far as defendant Opal Baker is now concerned, would be futile. This cause now being moot as to defendant Opal Baker, and to clarify the remaining issues herein, this cause is now dismissed as to said defendant Baker.

To resolve the remaining issues between plaintiff and defendant Alexander, it is not necessary for us to here determine the legal effect of the declaration executed by her, and whether the dividing of the housing accommodation in question into six separate estates and the sale of "private apartments" to prospective purchasers is within the ambit of the cooperative proviso of Section 209 (a) (2), *supra*. Regardless of that question, plaintiff would be entitled to prevail in this action and defendant Alexander subject to being enjoined as prayed, if the notice of eviction she caused to be served on tenant Israel was not made in good faith for the purpose of permanently removing the housing accommodation in question from the rental market.

Section 209 (a) (5) of the Housing and Rent Act of 1947, as amended, provides

SEC. 209. (a) No action or proceeding to recover possession of any controlled housing accommodations with respect to which a max-

imum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as that tenant continues to pay the rent to which the landlord is entitled unless—

* * * * *

(5) the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such.

Under the mandate of that subsection, a landlord cannot establish “good faith” in the withdrawal of a housing accommodation from the rental market if such attempted withdrawal is shown to be not permanent. A landlord who seeks to recover possession of a controlled housing accommodation for the immediate purpose, entertained in good faith, of withdrawing such accommodation from the rental market must, under subsection (5), *supra*, establish that such withdrawal is permanent and that so long as the Housing and Rent Act of 1947, as amended, remains in force, that such housing accommodation will not again be offered for rent, either by himself or through any subsequent owner thereof, *Woods v. Durr*, (3d Cir.) 170 F. 2d 976; *Woods v. Hillcrest Terrace Corp.* (8th Cir.) 170 F. 2d 980.

Therefore, assuming, without deciding, that the declaration executed by Ruth Alexander is not within the purview of the cooperative proviso of Section 209 (a) (2) and that the sale of private apartments pursuant thereto creates tenancies in common in the purchasers thereof, as contended by defendant, the

fact remains that the declaration executed by Ruth Alexander discloses, upon its face, that the housing accommodation here involved, and occupied by tenant Israel, is not in good faith, a permanent withdrawal of said housing accommodation from such market. Under said declaration, a defaulting purchaser of a "private apartment" may be evicted and the "private apartment" purchased by him placed on the rental market for the purpose of curing any defaults made in assessments chargeable to such purchaser under said declaration. Therefore, it is possible that after defendant Alexander sells the private apartment now occupied by tenant Israel, the purchaser thereof could become in default and said "private apartment," the housing accommodation here involved, could again be placed on the rental market during the time that the Housing and Rent Act of 1947, as amended, is in force. Under such circumstances, the notice of eviction served by the landlord on tenant Israel is established to be not a good faith withdrawal of the housing accommodation in question from the rental market and that said attempted eviction is in violation of Section 209 (a) (5), *supra*. Upon the undisputed facts in this case, plaintiff is entitled to the relief prayed.

A permanent injunction will be issued herein, restraining and enjoining the defendant Ruth Alexander from evicting, or attempting to evict, her tenant Harry L. Israel, Jr., from the housing accommodation in question, under the notice of eviction served upon him and involved in this action. Such injunction will not prohibit the service of any other proper notice of eviction by the landlord herein pursuant to

the terms of the Housing and Rent Act of 1947, as amended.

Plaintiff's counsel prepare decree.

ALBERT A. RIDGE,
Judge.

Dated at Kansas City, Missouri, this 18th day of February 1949.

APPEAL FROM THE FIRST CITY COURT OF NEW ORLEANS,
SECTION "C", No. 335-067; HONORABLE W. ALEX-
ANDER BAHNS, JUDGE

No. 19069, Court of Appeal, Parish of Orleans, State
of Louisiana

MR. AND MRS. JOHN A. POCHE, PLAINTIFFS AND
APPELLANTS

v.

PAUL L. THIBODEAUX, DEFENDANT AND APPELLEE

Plaintiffs in rule seek to obtain possession of the housing accommodations owned by them and occupied by Paul L. Thibodeaux as tenant. They allege that they desire to permanently withdraw the leased premises from Rent Market. The defendant excepted on the ground that the allegations are vague and indefinite and that the rule does not contain an allegation that the plaintiffs are in good faith, nor that they desire to remove the property from the rental market immediately. I find nothing in any of these exceptions.

The real defense is that the plaintiffs in rule are not in good faith.

In spite of the fact that they allege that they desire to withdraw the property from the rental market,

Mr. Thibodeaux took the stand and testified that he did not know just what he wanted to do with the property. He said that he might remodel it and use it himself, but that, on the other hand, he might desire to sell it and that it could more readily be sold without a tenant. It is my opinion that the "Housing and Rent Act of 1948" does not authorize a landlord to eject a tenant for any such indefinite reason as that given by plaintiffs. If plaintiffs desire the property for their own use as housing accommodations they should have brought their rule under section 209 (a) 2 which authorizes the landlord to recover possession "for his immediate and personal use and occupancy as housing accommodations". If, on the other hand, possession was desired for the purpose of withdrawing it from the rental market in order that it be sold to a prospective purchaser who had already been obtained and who desired to occupy it as housing accommodations, then the rule should have been brought under Section 209 (a) 3 of the statute.

I have been shown no section of the statute which, in my opinion, authorizes a landlord to eject a tenant so that the property may be more easily sold, unless a prospective purchaser has already been secured. In fact, as I interpret section 209 (a) 5, it seems to me to provide that even if the property is sold, it may not again be placed on the rental market, and I say this because section 209 (a) 3, which provides that it may be taken off the rental market in order that it may be sold to a purchaser who desires to occupy it as housing accommodations, seems to be inconsistent with any interpretation of Section 209 (a) 5, which would permit the property to be taken off the rental market so that it might be offered for sale.

It is true that in *Woods v. Durr*, No. 9811, of the docket of the United States Court of Appeals for the

Third Circuit, decided November 8, 1948, the Court held that a landlord who seeks to recover possession of his housing accommodations for the immediate good faith purpose of withdrawing them from the rental market is not prevented from doing so by the Housing and Rent Act as amended, and the fact that the landlord's purpose is to improve his opportunities for selling the property by having it ready for occupancy by a prospective purchaser is immaterial. In that case, however, it appeared that because of an overdue mortgage in a substantial amount, it was absolutely necessary that the house be sold.

At any rate, I am convinced that whatever his purpose may be, the landlord must set forth that purpose in his rule and he cannot be as indefinite about it as are the plaintiffs, who give no reasons except that they want to take it off the rental market.

I am convinced by the testimony that plaintiffs are not in good faith in stating that they merely want to take the property off the rental market.

The judgment appealed from is affirmed at the cost of appellants.

(Signed) GEORGE JANVIER,
Judge.

NEW ORLEANS, LOUISIANA, *January 25th, 1949.*

TESTIMONY OF MR. WOODS, HOUSING EXPEDITER, ON NEED
FOR INJUNCTIVE RELIEF AGAINST UNLAWFUL EVICTIONS

Mr. Woods. The large number of overceiling violations since July 1, 1947, is attributable primarily to the elimination of authority for the Housing Expediter to bring treble damage suits and to protect tenants from the threat of evictions for refusal to pay overceiling rents.

While tenants have the right under the present act to sue for treble damages, as a matter of fact, few

such suits have been instituted. Tenants have been restrained from bringing suits by the fear of black-listings, evictions, or other retaliation by the landlord.

Prior to the enactment of the present act, the Housing Expediter was able to prevent evictions in cases where a landlord was not acting in good faith but was seeking to use the threat of eviction to force payment of an illegal rent.

Under the present act, local courts which apply the eviction provisions of the act are often unaware of the lack of good faith on the part of the landlord in bringing eviction proceedings. * * *

Since July 1, 1947, there has been a substantial increase in the number of eviction actions filed in many local courts. For example, in Chicago during the 4-month period, July through October of 1947, the number of eviction suits filed showed an increase of more than 65 percent above the corresponding period in 1946.

A premium is placed on all kinds of evasive practices to get rid of tenants that resist increases in rent. Evictions go to the very heart of rent control. The mere threat of an eviction often constitutes an additional pressure upon the tenant which forces him to pay an increased rental with or without the benefit of a written lease. (Hearings before a Subcommittee of the Committee on Banking and Currency, United States Senate, 80th Cong., 2d Sess., on S. 1741, etc. pp. 92-93.)

HOUSING AND RENT ACT OF 1947, AS AMENDED MARCH
30, 1949 (PUB. L. 31, 81ST CONG., CH. 42, 1ST SESS.)

SEC. 209. Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act.

CONTROLLED HOUSING RENT REGULATION, AS AMENDED
AND AS EFFECTIVE APRIL 1, 1949

SEC. 825.6 *Removal of tenant*—(a) *Restrictions on removal of tenant*.—So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or for entry of judgment upon the tenant's confession for breach of the covenants thereof, or which otherwise provides contrary hereto, except on one or more of the grounds specified in this subsection (a), or unless the landlord has obtained a cer-

tificate in accordance with subsection (c) of this section; *Provided, however,* That no provisions of this section shall be construed to authorize the removal of a tenant unless such removal is authorized under local law.

(1) *Violating substantial obligation of tenancy.*—The tenant is violating a substantial obligation of his tenancy, other than an obligation to pay rent or an obligation to surrender possession of the housing accommodations, and has continued or failed to cure such violation after a written notice by the landlord that the violation cease.

* * * * *

(b) *Notices required.*—(1) No tenant shall be removed or evicted from housing accommodations by court process or otherwise and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in subsection (a) of this section unless and until the landlord shall have given written notice to the Area Rent Office and to the tenant as provided in this paragraph (b) (1).

Every such notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession. Where the ground for removal or eviction of a tenant is nonpayment of rent such notice shall include a statement of the rent due and the rental period or periods for which such rent is due. A written copy of every notice required by this paragraph (b) (1) shall be filed with the Area Rent Office within 24 hours after such notice is given to the tenant.

* * * * *

(c) *Eviction certificate—grounds for issuance.*—No tenant shall be removed or evicted on grounds other than those stated in subsection (a) of this section, unless on petition of the landlord the Housing Expediter certifies that the landlord may pursue his remedies in accordance with the requirements of local law. The certificate shall authorize the pursuit of local remedies at the expiration of the waiting period specified in subsection (d) of this section. The Expediter shall so certify if he finds that removals or evictions of the character proposed are not inconsistent with the purposes of the Act or this regulation and would not be likely to result in the circumvention or evasion thereof. The Expediter shall so find in the following cases:

* * * *

(5) *Withdrawal from rental market.*—Where the landlord establishes that he seeks in good faith to recover possession of the housing accommodations for the immediate purpose of (a) making a permanent conversion to commercial use by substantially altering or remodeling them or (b) personally making a permanent use of them for nonhousing purposes or (c) permanently withdrawing them from both the housing and nonhousing rental markets without any intent to sell the housing accommodations.

(d) *Eviction certificates—waiting period.*—Certificates issued under subsection (c) of this section shall authorize the pursuit of local remedies at the expiration of three months from the date of the filing of the petition; *Provided, however, That:*

(1) In cases under paragraph (c) (5) of this section the waiting period shall be six months.

No. 12131

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER,

Appellant,

vs.

SYDNEY MARK TAPER, HARDING MANOR, INC., WARDLOW
HEIGHTS, INC., and WARDLOW ANNEX, INC.,

Appellees.

APPELLEES' REPLY BRIEF.

FILE

MAY 28 1949

~~PAUL R. O'DRIEN,~~

CLERK

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Appellees.

RESPONDENTS' REPLY BRIEF.

Statutes and Regulations Involved.

The pertinent provisions of the applicable statutes and regulations appear in the appendix of appellant's opening brief and additional quotations therefrom will appear in the body of appellees' brief.

Statement of the Facts.

The statement of facts in appellant's brief is substantially correct and summarizes the matters contained in the record. The defendants were the owners of five single-

family residences referred to in plaintiff's complaint which were tenant-occupied. On or about June 3, 1948, the appellees served each of the tenants with notices under Section 209(a)(5) of the Housing and Rent Act of 1947 as amended requiring the tenants to vacate the premises. The notices further stated that the landlord sought in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing them from the rental market. The notices further provided that the housing accommodations would not thereafter be offered for rent as such. The facts were undisputed.

Three separate actions were brought by the Housing Expediter pursuant to Section 206 of the act to restrain and enjoin the appellees from evicting the tenants.

Appellant cites the order of Judge Pierson M. Hall on his application for a preliminary injunction at some length at pages 5 and 6 of his brief as though the proceedings were in fact contested or constituted a final decision. The order of Judge Hall on the preliminary injunction was likewise cited by the appellant in many other cases throughout the country evidently as a final determination. It appears that the emphasis placed by appellant on that order may have mislead counsel and the courts. This will be more particularly referred to in appellees' brief hereafter.

As a matter of fact and as the record will show [R. 46], the papers were served in this case on appellee, Taper, on a Friday evening shortly after the appellee had

returned to his office after being away for more than two weeks. The hearing was set for the following Monday morning. Due to inadvertence, the short notice, and the facts more particularly set forth in the record, the appellees failed to make any appearance either personally or by counsel [R. 19].

After the service of the notices to vacate aforesaid, two of the tenants, namely, Alvin L. Fite and Henry Monkiewicz, voluntarily vacated the premises [R. 131, Findings of Fact 5]. The remaining three tenants vacated by October 25, 1948.

Appellees' motion for summary judgment was granted, findings of fact and conclusions of law were made by the court and the decree was entered pursuant thereto in favor of the appellees [R. 136-139] on October 13, 1948, among other things decreeing that the appellees have the right to evict the tenants in possession of the property described in the complaint on the ground that the appellees desire in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing them from the rental market. The decree provided that the housing accommodations shall not hereafter be offered for rent as such. It also required that if the appellant should sell any of the properties set forth in the complaint, then the agreement of sale shall provide that the purchaser will not place the premises on the rental market to be used as housing accommodations so long as they are subject to that restriction by law.

SUMMARY OF ARGUMENT.

I.

The case turned upon the interpretation to be placed upon Section 209(a)(5) of the Housing and Rent Act of 1947, as amended, which provides for eviction of tenants where the landlord seeks in good faith to recover possession for the immediate purpose of permanently withdrawing the housing accommodations from the rental market.

The answer to this problem really determined the case. A reading of appellant's extensive brief indicates that this is the controlling issue.

It is submitted that Section 209(a) specifies eight *independent* grounds for eviction of tenants. Section 209 (a)(5) is clear and unambiguous. It requires nothing further than an actual reading of its language. Appellant's extensive brief is merely occasioned by one fact, namely, that he wishes to detract from the plain, simple and unambiguous language of the section. Appellant seeks to change the crystal clear language of the section by administrative construction and is attempting to have this Honorable Court indulge in judicial legislation.

II.

The amendment of March 1949, of the Housing and Rent Act of 1947 and specifically Section 825.6 of the Housing Expediter's regulation issued on April 1, 1949, particularly Sub-section (H)(2), exempts this action from the March 1949, amendment. The judgment permitting the removal of the tenants was entered by decree of the court below on October 13, 1948, which was prior to the controlling effective date of April 1, 1949 [See R. 138].

III.

There was no genuine issue as to any material facts to be tried and the motion granting appellees' summary judgment was proper under Rule 56 of the Federal Rules of Civil Procedure.

ARGUMENT.

I.

The Trial Court Properly Held That a Landlord May Recover Possession of Housing Accommodations for the Immediate Purpose of Permanently Withdrawing Them From the Rental Market in Accordance With Section 209(a)(5) of the Act.

The language of the section is clear beyond any controversy. It does not require any interpretation; it merely requires a reading. Any layman could read Section 209 (a)(5) and give its meaning without hesitation. The only reason why this interpretation resolves itself into an extensive and lengthy one is that appellant seeks to go beyond the clear language of the Act to *interpret* or *construe* it to mean something other than that which it clearly states.

(a) The Plain Language of Section 209(a)(5).

Referring to appellant's brief, Point Ia, pages 11 to 20, it is respectfully submitted that it is difficult to see what argument is necessary other than a reading of Section 209(a)(5) in order to determine what is the plain language of that section. Appellant at page 12 has set forth the section verbatim and it is submitted that its reading alone will determine the issue.

It is a general rule of law that requires little citation of authority that if the words of a statute given their ordinary and popular signification are reasonably free from ambiguity and uncertainty, the court will look no further to ascertain its meaning even though it may appear probable that a different object was in the mind of the legislature. The legislature's intention and meaning must be

determined primarily from the language of the statute itself.

Magnano Co. v. Hamilton, 64 S. Ct. 599, 292 U. S. 40, 78 L. Ed. 1109.

The intention of Congress is to be sought for primarily in the language used and when the language expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture.

Gorin v. U. S., 111 F. 2d 712, 61 S. Ct. 429, 312 U. S. 19, 85 L. Ed. 488.

It has been held that if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.

Barr v. U. S., 65 S. Ct. 522, 324 U. S. 83, 89 L. Ed. 765.

The language of the section is clear. If the landlord intends in good faith to immediately withdraw the housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such, he is entitled to obtain possession from his tenants. The landlord is assuming a definite obligation in using this section in that he must see to it that the housing accommodations shall not thereafter be offered for rent as such. That is his responsibility and though it is burdensome, it is not for the appellant to say that it is too burdensome and therefore prevent the appellees from the use of this section.

It is respectfully submitted that appellant has mislabeled his argument in his brief, pages 11 to 20, when he states

that portion of his argument is in support of the plain language of Section 209(a)(5). None of the arguments advanced by appellant in this section of his brief has any bearing upon what the plain language of the section states.

Counsel will reply to appellant's argument in the order given in his brief.

1. At pages 11 to 15 of appellant's brief, it is stated that the plain meaning of Section 209(a)(5) of the Act does not permit the construction given by the trial court in this action. Appellant's argument is that it is impracticable and difficult for the landlord to comply with the provisions of the Act and therefore, and actually, the plain meaning of the section should not be given full force and effect. Admittedly that is a burdensome obligation which the landlord undertakes, but it has nothing to do with the plain language of the section.

Reference was heretofore made to the fact that the case at bar was cited as authority prior to judgment by the appellant in a number of other cases in other jurisdictions. The court's attention is respectfully referred to page 13 of appellant's brief, particularly the case of *Property Service Company v. Spicknall*, decided in the People's Court of Baltimore City, the opinion of which is set forth at page 83 of appellant's brief. It will be noted that at page 87 of appellant's brief wherein the opinion is set forth in full, the case at bar is the only case relied upon by the court. Evidently counsel for the appellant in the herein action cited the order on the uncontested preliminary injunction made by Judge Hall without awaiting a final determination on the merits of the case. Certainly the case of *Property Service Company v. Spicknall*, rely-

ing completely on the uncontested preliminary injunction granted in the case at bar, before judgment, cannot now be considered as authority for this case. It appears from the opinion of the case in *Property Service Company v. Spicknall*, *supra*, that the court therein was not advised that this was a preliminary order, that it was uncontested and that a judgment on the merits had not been granted. It is reasonable to assume if that case would have come up subsequent to the judgment entered herein in favor of appellees on their motion for summary judgment, the opinion would be the reverse.

2. At page 16 of this brief, appellant states that the court imposed certain conditions in its decree as an “. . . adequate substitute for the letter of the law . . .”

Appellant devotes ten pages of his brief, from pages 11 to 20, to argue what the letter of the law, that is Section 209(a)(5), really states. It is respectfully submitted that the only argument that is required in this regard is to set forth the section verbatim for this Honorable Court to read. The language is crystal clear. However, in view of the mental gymnastics of appellant in its lengthy argument as to what the plain language of the section is, appellees have discussed the matter at greater length than would otherwise be necessary.

It is submitted that the landlord who wishes to remove his tenant for the purpose of permanently withdrawing the property from the rental market, is not required to proceed under 209(a)(3) if he sells his property at some later date. The appellant cannot insist that he first obtain a purchaser and proceed under Section 209(a)(3). Each of the grounds for eviction set forth in Section 209(a) of the Act are independent, nor can it be said

that Section 209(a)(3) of the Act is the only one that a landlord can use if he ultimately intends to make a sale regardless of his immediate purpose of permanently withdrawing the housing accommodations from the rental market.

3. It is difficult to see how appellant's argument under its sub-head 3, pages 19 and 20 of its brief, in any way affects the case at bar. Appellant states at page 19 of its brief:

"If we accept appellee's theory that a landlord may evict for his purposes of sale regardless of the restrictions contained in sub-section 5, then by token of the same reasoning, a landlord need not also comply with the 65% requirement of sub-section 2."

(Appellee's argument is in reference to the curbing of a "cooperative housing racket.")

It is difficult to see how appellant can so mis-state appellees' position; nor has there been any contention in the case up to this point that the facts herein had any connection whatsoever with a "co-operative housing racket." This argument must have been in error.

Appellee's position is that so clearly stated by the language of Section 209(a)(5). A landlord who chooses Section 209(a)(5) to evict and remove a tenant must act in good faith and his immediate purpose must be to withdraw the housing accommodations from the rental market. In addition, the landlord undertakes the obligation that such housing accommodation shall not thereafter be offered for rent as such. The fact that this is a burdensome obligation is of no concern to the appellant. A violation of this section would invoke the penalties provided by the act. As long as the housing accommodations are perma-

nently withdrawn from the rental market the act has been complied with, and by way of illustration and without limitation, the landlord could thereafter do any of the following things with his property:

- A. Keep the housing accommodations vacant.
- B. Convert and rent as a commercial structure.
- C. Remodel, redecorate and renovate the property and thereafter, if he so chooses, sell the property. In such event, he must take precautions not to allow the housing accommodations to be placed on the rental market as such thereafter.
- D. Use the housing accommodations as storage space.
- E. Demolish the premises.
- F. After withdrawing the housing accommodations from the rental market, he may choose to reside on the premises.

(b) The Attempted Construction of Section 209(a)(5) by Appellant Violates the Most Elementary Principles of Statutory Construction.

Appellant refers to “the most elementary principles of statutory construction,” but yet by attempting to justify its position, it tries to read into the plain meaning of the section what the legislative intention should have been and not what the clear and unambiguous language of Section 209(a)(5) plainly states.

The most primary and elementary rule in construing statutes is to ascertain and give effect to legislative intention, but that intention and meaning must be determined from the language of the statute itself. When the language expresses an intention reasonably intelligible and

plain, it must be accepted without modification by resort to construction or conjecture.

McLeod v. Nagel, 48 F. 2d 189;

Magnano Company v. Hamilton, *supra*;

Gorin v. U. S., *supra*.

Since Congress has made a choice of language which fairly brings a given situation within the statute, it is unimportant that the particular application may not have been contemplated by the legislators.

Barr v. U. S., *supra*.

The argument of appellant that Section 209(a)(3) is the only one that can be used by a landlord in the event that at any future or distant time a sale is made of the property is without merit. The reading of the sections involved is sufficient to indicate that they cover different situations. Could it be seriously urged that a landlord would be in violation of the Act if he proceeded under section 209(a)(4) substantially remodelled the housing accommodations and long thereafter sold the premises? Similarly it cannot be argued as appellant does in its brief at page 21, that sub-section (5) was intended to repeal the provisions of sub-section (3) if appellees' construction of sub-section (5) is adopted. It is specious reasoning for appellant to state that the trial court's ruling results in a repeal by implication of sub-section (3) or sub-section (2). Each of the sub-sections obviously serves a different purpose.

The language of the United States Court of Appeals for the Third Circuit, in the case of *Woods v. Durr*, 170

F. 2d 976 (C. C. A. 3rd), states the applicable law as follows:

“It is the plaintiff’s contention that paragraph (3) of Section 209(a) is the only paragraph of that section which permits eviction for the purpose of sale and that it is not applicable because the defendant admittedly has not entered into a written contract to sell the premises to any specific purchaser. The defendant on the other hand urges that paragraph (5) of Section 209(a) permits the eviction proceeding which she has instituted. She asserts that since she seeks in good faith to recover possession for the immediate purpose of withdrawing her property permanently from the rental market she comes within the express terms of paragraph (5) and that her purpose for doing so is immaterial so long as it involves the permanent withdrawal of the property from the rental market. In answer to this contention the plaintiff concedes, as indeed he must, that the language of paragraph (5) is broad enough to cover the defendant’s case but contends that the generality of this language must be limited to cases not covered by the other paragraphs of Section 209(a). Among the other paragraphs he points to paragraph (3) which relates specifically to sales and he says that the two paragraphs must be construed in harmony with each other and accordingly paragraph (5) must be read as not applicable to the recovery of possession for the purpose of sale.”

“ . . . On the contrary the case is one for the application of the basic rule that where the language of a statute is plain and unambiguous there is no occasion for construction and it must be taken to mean what it clearly says. That, we think, is the case here.

“Moreover we do not see any inconsistency between paragraph (5) as applied by the district court in this case and paragraph (3). While they may at times overlap, the reach of the two paragraphs is quite different.”

“ . . . It will thus be seen that paragraph (3) applies only to contracted sales of a property and involves no bar to its subsequent renting while paragraph (5) applies to any sort of withdrawal of a property from the rental market, whether for purposes of sale or otherwise, when the withdrawal is to be permanent.”

“ . . . What such a landlord proposes to do with his accommodations is wholly immaterial provided he understands and intends in good faith that they shall not, at least so long as Section 209(a)(5) of the Act remains in force, again be offered for rent as housing accommodations whether by him or any subsequent owner.”

- (c) The Construction of the Act by the Trial Court Is Governed by the Most Elementary Principles of Statutory Construction, That the Plain Language of Section 209(a)(5) Governs. This Construction Does Not Thwart Effective Rent Control.**

Appellant's argument under this point merely finds fault with the Act as enacted by Congress. Appellant speaks of the “field day” that speculators enjoy and their ability to “make a killing” under the plain language of Section 209(a)(5). This is merely a matter of conjecture on appellant's part. Appellant states that a landlord may obtain a higher price for his accommodations when vacant which is admittedly true. However, would he obtain a

higher price if there is a further condition that so long as Section 209(a)(5) of the Act remains in force the property cannot again be offered for rent as housing accommodations. Appellant states unequivocally, as a matter of business judgment, that a sale made under such circumstances would bring a higher price than a sale to a purchaser with a tenant in possession and without such restriction permanently withdrawing the housing accommodations from the rental market. The mere statement of this business problem is sufficient to indicate that the most astute real estate owners and operators could not give such an unequivocal answer to the question covering all situations as appellant so blithely does in his brief, particularly at pages 26 and 27.

Once again, appellant relies on the case of *Property Service Company v. Spicknall*, *supra*, which was followed by *Fox v. Robertson* in the same court. Both of these cases are based upon the order of Judge Hall made after the default hearing of the appellant's petition for a preliminary injunction and prior to the judgment rendered herein. Evidently since the case of *Fox v. Robertson* was decided on January 11, 1949, which was approximately three months subsequent to the judgment rendered herein, it appears that appellant has not corrected his records in submitting briefs on this point in other jurisdictions; or in any event, he has not advised other courts of the judgment now existing in the herein action. (See App. Br. p. 81.)

- (d) The Construction Given to Section 209(a)(5) by the Trial Court Is Contrary to the Expediter's Administrative Interpretation, but That Interpretation Being in Direct Conflict With the Plain Terms of the Statute, Is of No Effect Whatsoever.

The statement in *Woods v. Durr, supra*, hereafter following, answers appellant's contention in this regard completely:

"For the reasons given we cannot agree with the contrary limited interpretation placed upon paragraph (5) by the plaintiff in his Housing and Rent Memorandum No. 51 upon which he now strongly relies. The power to issue regulations which Section 204(d) of the Act conferred upon him was limited to Sections 202(c) and 204 and did not extend to evictions, the subject of Section 209. The interpretation is, therefore, in no sense binding upon us and since it is in conflict with both the statutory language and the Congressional intent we cannot follow it."

- (e) The Legislative History Further Supports the Trial Court's Interpretation of Section 209(a)(5).

On page 31 of Appellant's Brief, it is stated:

"In *Woods v. Durr, supra*, the court reached the conclusion that 'the legislative history of subsection (5) supports the literal construction that a landlord may resort to Section 209(a)(5) to evict tenants for purposes of sale.'"

Appellees have examined the opinion in *Woods v. Durr, supra*, carefully and do not find any such language. There

is a quote from the case which ends with the word “supports,” but the remainder of the so-called quote from the case of *Woods v. Durr* was probably set forth by appellant in his brief at page 31 in error.

As long as the landlord intends in good faith to withdraw the housing accommodations from the rental market so long as Section 209(a)(5) of the Act remains in force and that is his immediate purpose, he has complied with the section.

It is submitted that the remarks of the court in *Woods v. Durr, supra*, setting forth the legislative references merely bolster the opinion that the clear language of the section should be given effect without resort to administrative detraction.

(f) *Taylor v. Bowles*, 145 F. 2d 833 (E. C. A.), Supports the
Decree of the Trial Court.

Appellant seeks to limit the effect of *Taylor v. Bowles, supra*, in some fashion but it is difficult to see any real difference in fact or in principle.

As stated in *Woods v. Durr, supra*, as follows:

“In *Taylor v. Bowles*, 145 F. 2d 833 (E. C. A. 1944), the Emergency Court of Appeals placed a broad construction upon Section 4(d) of the Emergency Price Control Act, holding that under its provisions a landlord might withdraw his housing accommodations from the rental market merely because of dissatisfaction with the existing maximum rents.

We think that the almost identical provisions of Section 302 of the Housing and Rent Act of 1948 and the complementary provisions of Section 209(a)(5), which that act added to the Housing and Rent Act of 1947, must be given an equally broad interpretation in accordance with their plain language in order to carry out the Congressional intent to avoid any constitutional difficulty.”

In closing the argument on this issue appellees wish to call the court’s attention to page 41 of Appellant’s Brief as follows:

“To sum up the issues: The construction which the Court below gave to the Act is contrary to the plain language used;”

It is submitted that the language of the section is so clear that it is difficult to believe that appellant is serious in this contention.

II.

The Housing and Rent Act of 1947 as Amended in 1949 and the Regulations Issued Thereunder Effective April 1, 1949, Do Not Require Appellees to Apply to the Housing Expediter for a Certificate of Eviction.

The 1949 amendment to the Housing and Rent Act of 1947 and the regulation issued thereunder dated April 1, 1949, being Section 825.6, and particularly Paragraph (H)(2) excepts the appellees from the necessity of obtaining a certificate of eviction. That section of the regulation above quoted provides in part as follows:

“(2) The provision of this section shall not apply to any case in which judgment was entered prior to April 1, 1949, by a court of competent jurisdiction for the eviction or removal of a tenant from housing accommodations.”

On October 13, 1948, the appellees were determined by the decree of the trial court to: “. . . have the right to evict tenants in possession of the property described in the complaint herein . . .” [R. 138.]

In addition, the five tenants involved have all vacated said premises, the last on October 25, 1948, and the first two, being Alvin L. Fite and Henry Monkiewicz, vacated prior to the entry of the judgment [Findings of Fact No. 5, R. 131] and thus it would be impossible to apply for any certificate for their eviction.

III.

**The Motion for Summary Judgment Was Properly
Granted.**

There was no genuine issue as to any material fact and appellees were entitled to summary judgment under Rules of Civil Procedure, Section 56(c). An examination of the contentions of appellant in regard to this point indicates no real issue as to any material fact exists. Appellees contended, as pointed out at page 49 of Appellant's Brief, that their acts were not in violation of the Housing and Rent Act of 1947 as amended. A question of law was involved. There was no real issue of fact and no such contention was seriously made. It was simply a question as to whether the acts complained of did or did not constitute violations of Section 209(a)(5) of the Housing and Rent Act of 1947 as amended.

For the reasons stated above, it is respectfully submitted that the judgment of the trial court should be affirmed.

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No. 12132
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN D. WALKER,

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vs.

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TRANSCRIPT OF RECORD

Appeal from the United States District Court for the
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Central Division

FILED

MAR 18 1949

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles 12, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

September, 1948, Term

No. 20366

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN D. WALKER, SAM McMURRAY, CHESTER
JEFFERSON, and EDWARD ROY,

Defendants.

INDICTMENT

[U. S. C., Title 26, Sec. 3224(a)—Sale of Narcotics]
The grand jury charges:

COUNT ONE

[26 U. S. C. 3224(a)]

On or about September 10, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants John D. Walker and Edward Roy did sell to Fred Dauge a certain narcotic drug, namely: approximately one grain of heroin, a derivative of opium, which said heroin was sold by the said defendants without having registered with the Collector of Internal Revenue as dealers in this narcotic, and without paying the special tax imposed on such dealers by law. [2]

COUNT TWO

[26 U. S. C. 3224(a)]

On or about September 12, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Edward Roy did sell to George R. Davis a certain narcotic drug, namely: approximately two grains of heroin, a derivative of opium, which said heroin was sold by the said defendant without having registered with the Collector of Internal Revenue as a dealer in this narcotic, and without paying the special tax imposed on such dealers by law. [3]

COUNT THREE

[26 U. S. C. 3224(a)]

On or about September 13, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Edward Roy did sell to George R. Davis a certain narcotic drug, namely: approximately two grains of heroin, a derivative of opium, which said heroin was sold by the said defendant without having registered with the Collector of Internal Revenue as a dealer in this narcotic, and without paying the special tax imposed on such dealers by law. [4]

COUNT FOUR

[26 U. S. C. 3224(a)]

On or about September 15, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Edward Roy did sell to George R. Davis a certain narcotic drug, namely: approximately one grain of heroin, a derivative of opium, which

said heroin was sold by the said defendant without having registered with the Collector of Internal Revenue as a dealer in this narcotic, and without paying the special tax imposed on such dealers by law. [5]

COUNT FIVE

[26 U. S. C. 3224(a)]

On or about September 16, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants John D. Walker and Chester Jefferson did sell to George R. Davis a certain narcotic drug, namely: approximately two grains of heroin, a derivative of opium, which said heroin was sold by the said defendants without having registered with the Collector of Internal Revenue as dealers in this narcotic, and without paying the special tax imposed on such dealers by law. [6]

COUNT SIX

[26 U. S. C. 3224(a)]

On or about September 17, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants John D. Walker and Edward Roy did sell to George R. Davis and Fred Dauge a certain narcotic drug, namely: approximately two grains of heroin, a derivative of opium, which said heroin was sold by the said defendants without having registered with the Collector of Internal Revenue as dealers in this narcotic and without paying the special tax imposed on such dealers by law. [7]

COUNT SEVEN

[26 U. S. C. 3224(a)]

On or about September 20, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants John D. Walker and Edward Roy did sell to George R. Davis and Fred Dauge a certain narcotic drug, namely: approximately one grain of heroin, a derivative of opium, which said heroin was sold by the said defendants without having registered with the Collector of Internal Revenue as dealers in this narcotic and without paying the special tax imposed on such dealers by law. [8]

COUNT EIGHT

[26 U. S. C. 3224(a)]

On or about September 22, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants John D. Walker and Sam McMurray did sell to George R. Davis a certain narcotic drug, namely: approximately one grain of heroin, a derivative of opium, which said heroin was sold by the said defendants without having registered with the Collector of Internal Revenue as dealers in this narcotic, and without paying the special tax imposed on such dealers by law.

A True Bill.

A. L. ALDSWEDE

Foreman

JAMES M. CARTER

United States Attorney

[Endorsed): Filed Oct. 27, 1948. Edmund L. Smith,
Clerk. [9]

[Minutes: Monday, November 1, 1948]

Present: The Honorable Peirson M. Hall, District Judge.

For arraignment and plea; E. J. Zack, Ass't U. S. Att'y, appearing as counsel for Gov't; Paul Tapley, Esq., appearing as counsel for all defendants except Def't Walker; Leo V. Silverstein, Esq., appearing as counsel for Def't Walker, who is on bond in another case, and on O/R in this case; the other defendants being present in custody;

Defendants state their true names are as set forth in Indictment, are informed they are entitled to jury trial and counsel, waive reading of Indictment and each defendant enters separate plea of not guilty to each count.

Court orders cause set for trial Nov. 23, 1948, 10 A. M. [10]

[Title of District Court and Cause]

VERDICT

We, the jury in the above-entitled case, find the defendant, John D. Walker, Guilty as charged in count five of the Indictment; Guilty as charged in count six of the Indictment; Guilty as charged in count seven of the Indictment; and, Guilty as charged in count eight of the Indictment.

We, the Jury in the above-entitled case, find the defendant, Sam McMurray, Guilty as charged in count eight of the Indictment.

We, the Jury in the above-entitled case, find the defendant, Chester Jefferson, Guilty as charged in count five of the Indictment.

We, the Jury in the above-entitled case, find the defendant, Edward Roy, Guilty as charged in count two of the Indictment; Guilty as charged in count three of the Indictment; Guilty as charged in count four of the Indictment; Guilty as charged in count six of the Indictment; and, Guilty as charged in count seven of the Indictment.

Dated: Los Angeles, California, November 24, 1948.

GERTRUDE AGNES ANDERSEN

Foreman of the Jury

[Endorsed]: Filed Nov. 24, 1948. Edmund L. Smith, Clerk. [11]

District Court of the United States for the
Southern District of California
Central Division

No. 20366—Criminal

UNITED STATES OF AMERICA

v.

JOHN D. WALKER

JUDGMENT AND COMMITMENT

On this 13th day of December, 1948, came the attorney for the government and the defendant appeared in person and by counsel, Leo V. Silverstein, Esq.,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of the sale of narcotics in violation of Section

3224(a), Title 26, U. S. Code, as charged in each of counts five, six, seven and eight of the Indict. and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years in an institution of the penitentiary type on count five of the Indictment; and, on each of counts six, seven and eight the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year, said sentences to begin and run concurrently with each other and not consecutively to one another, and to begin and run concurrently with the last year of the five-year term of imprisonment imposed on count five herein.

It Is Adjudged that on the Court's own motion the bond of the defendant is exonerated and the defendant forthwith remanded to the custody of the U. S. Marshal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

PEIRSON M. HALL

United States District Judge

[Endorsed]: Filed Dec. 13, 1948. Edmund L. Smith,
Clerk. [12]

[Title of District Court and Cause]

NOTICE OF APPEAL

Name and Address of Appellant: John D. Walker,
226 West 40th Place, Los Angeles, California.

Name and Address of Appellant's Attorney: Leo V.
Silverstein, 210 West Seventh Street, Los Angeles 14,
California.

Offense: Violation of 26 U. S. C., Sec. 3224(a).

Concise statement of judgment or order giving date of
any sentence:

Defendant having been found guilty on Counts Five,
Six, Seven and Eight of the Indictment, the Court, on
December 13, 1948, pronounced judgment as follows: "It
is the judgment and sentence of the Court that the de-
fendant John D. Walker on Count Five of the Indict-
ment, be committed to the custody of the Attorney General
for [13] a period of five years. It is the judgment and
sentence of the Court that the defendant John D. Walker
be committed to the custody of the Attorney General for
a period of one year each on Counts Six, Seven and Eight,
to be concurrent and not consecutive with one another
and to be concurrent and not consecutive to the last year
of the five years on Count Five."

Name of prison where confined if not on bail: County
Jail, Los Angeles, California.

I, John D. Walker, hereby appeal to the United States
Circuit Court of Appeals for the Ninth Circuit from the
above judgment.

Dated: December 14, 1948.

JOHN D. WALKER
Appellant

LEO V. SILVERSTEIN
Attorney for Appellant

[Endorsed]: Filed & mld. copy to U. S. Atty., Dec.
14, 1948. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

STIPULATION AND ORDER EXTENDING TIME
FOR FILING AND DOCKETING

It Is Hereby Stipulated by and between the parties hereto through their respective counsel that defendant and appellant John D. Walker, may have to and including March 1, 1949, within which to file and docket the record on appeal in the above entitled matter, subject to order of the Court.

Dated: December 13, 1948.

JAMES M. CARTER

United States Attorney

By Norman W. Neukom

Deputy

Attorneys for Plaintiff

LEO V. SILVERSTEIN

Attorney for Defendant and Appellant
John D. Walker

12/15/48. So ordered.

PEIRSON M. HALL

Judge

[Endorsed]: Filed Dec. 15, 1948. Edmund L. Smith,
Clerk. [15]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 20, inclusive, contain the original Indictment; Verdict; Judgment and Commitment; Notice of Appeal; Stipulation and Order Extending Time for Filing and Docketing; Statement of Points Appellant Intends to Rely Upon on Appeal and Designation of Contents of Record on Appeal and a full, true and correct copy of Minute Order Entered November 1, 1948, which constitute the record on the appeal of John D. Walker to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21st day of February, A. D. 1949.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Endorsed]: No. 12132. United States Court of Appeals for the Ninth Circuit. John D. Walker, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed February 23, 1949.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term 1948, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the 31st day of December in the year of our Lord one thousand nine hundred and forty-eight.

Present:

Honorable William Denman, Chief Judge, Presiding,
Honorable Homer T. Bone, Circuit Judge,
Honorable William E. Orr, Circuit Judge.

No. 12132

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER GRANTING MOTION FOR ADMISSION
TO BAIL PENDING APPEAL, AND FIXING
BAIL

Upon consideration of the motion of appellant for admission to bail pending appeal, heretofore submitted to this Court, and it appearing therefrom and from the oral arguments of counsel had thereon, that the appellee concedes that Walker's appeal presents a contention reasonably warranting our consideration and makes no opposition to the motion for release of appellant on bail pending appeal,

It Is Ordered that said motion be, and hereby is granted, and that appellant be, and he hereby is admitted to bail upon the posting of a bail bond, conditioned as required by law, in the amount of \$10,000.00, the bond to be approved by the United States Attorney and the District Court for the Southern District of California, and filed with the clerk of said District Court.

In the United States Court of Appeals
for the Ninth Circuit

No. 12132

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
v.
JOHN D. WALKER,
Defendant and Appellant.

STATEMENT OF POINTS INTENDED TO BE
RELIED UPON ON APPEAL AND DESIGNA-
TION OF RECORD NECESSARY TO CON-
SIDER SAME

The appellant intends to rely upon the following point
on appeal:

The indictment, and in particular Counts Five, Six,
Seven and Eight thereof, fails to state an offense against
the laws of the United States.

The appellant hereby designates the following record
necessary to consider the appeal:

* * * * *

Dated: February 21, 1949.

LEO V. SILVERSTEIN
Attorney for Defendant and Appellant.

Received copy of the within Statement of Points this
21st day of February, 1949. James M. Carter, U. S. At-
torney, by Veloris Bonhus.

[Endorsed]: Filed Feb. 23, 1949. Paul P. O'Brien,
Clerk.

No. 12132.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

LEO V. SILVERSTEIN,

837 Van Nuys Building, Los Angeles 14.

Attorney for Appellant.

FILED

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No. 12132.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Jurisdiction is conferred by Title 28, Sections 1291 and 1294, U. S. C., and Title 26, Section 3224(a), U. S. C.

This is a criminal appeal. Appellant was sentenced on December 13, 1948 [R. 7-8] and filed Notice of Appeal on December 14, 1948 [R. 9] within the time set by law.

Statutes Involved.

Title 26, U. S. C., Sec. 3224:

“(a) Trafficking. It shall be unlawful for any person required to register under the provisions of this part or section 2551(a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551(a).”

Brief Statement of the Case.

This is an appeal from a conviction of appellant on Counts Five, Six, Seven and Eight of the Indictment [R. 6-7]. Appellant, with other defendants, was charged in said Counts on or about September 16, 1948; September 17, 1948; September 20, 1948, and September 22, 1948 [R. 4-5] with selling a narcotic drug, namely, heroin, a derivative of opium, without having registered with the Collector of Internal Revenue as a dealer in said narcotic and without paying the special tax imposed on said dealer by law.

SPECIFICATION OF ERRORS.

1. The indictment, and in particular Counts Five, Six, Seven and Eight thereof, fails to state an offense against the laws of the United States.

I.

The Indictment, and in Particular Counts Five, Six, Seven and Eight Thereof, Fails to State an Offense Against the Laws of the United States.

There is no allegation in the indictment that appellant was required to register. It is the contention of appellant that the failure to allege that appellant was one of the class required to register is fatal to the indictment.

Houston v. U. S., 5 F. 2d 497 (5th Circuit);

Ex parte McGonigle, 2 F. 2d 784 (Dist. Court, Kans., First Division);

United States v. Mercurio, et al., 33 F. 2d 142 (Dist. Court, N. D. New York);

Gerardi v. U. S., 24 F. 2d 189 (1st Circuit);

Smith v. U. S., 17 F. 2d 723 (8th Circuit);

Stokes v. U. S., 39 F. 2d 440 (8th Circuit).

The indictment does not state the heroin was sold in original stamped packages. Section 3228(c), 26 U. S. C., defines wholesale dealer:

“(c) Wholesale Dealer. Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 2553(a) shall be deemed a wholesale dealer.”

The indictment does not state the heroin was sold from original stamped packages. Section 3228(d), 26 U. S. C., defines retail dealer :

“(d) Retail dealer. Every person who sells or dispenses from original stamped packages as provided in section 2553(a) shall be deemed a retail dealer: Provided, That the office, or if none, the residence, of any person shall be considered for the purposes of this part and subchapter A of chapter 23 his place of business. 53 Stat. 384.”

Stokes v. U. S., 39 F. 2d 440 (8th Circuit).

Conclusion.

Appellant respectfully prays that the judgment of conviction be reversed.

Respectfully submitted,

LEO V. SILVERSTEIN,

Attorney for Appellant.

No. 12132
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

JAMES M. CARTER,

United States Attorney;

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney;

NORMAN W. NEUKOM,

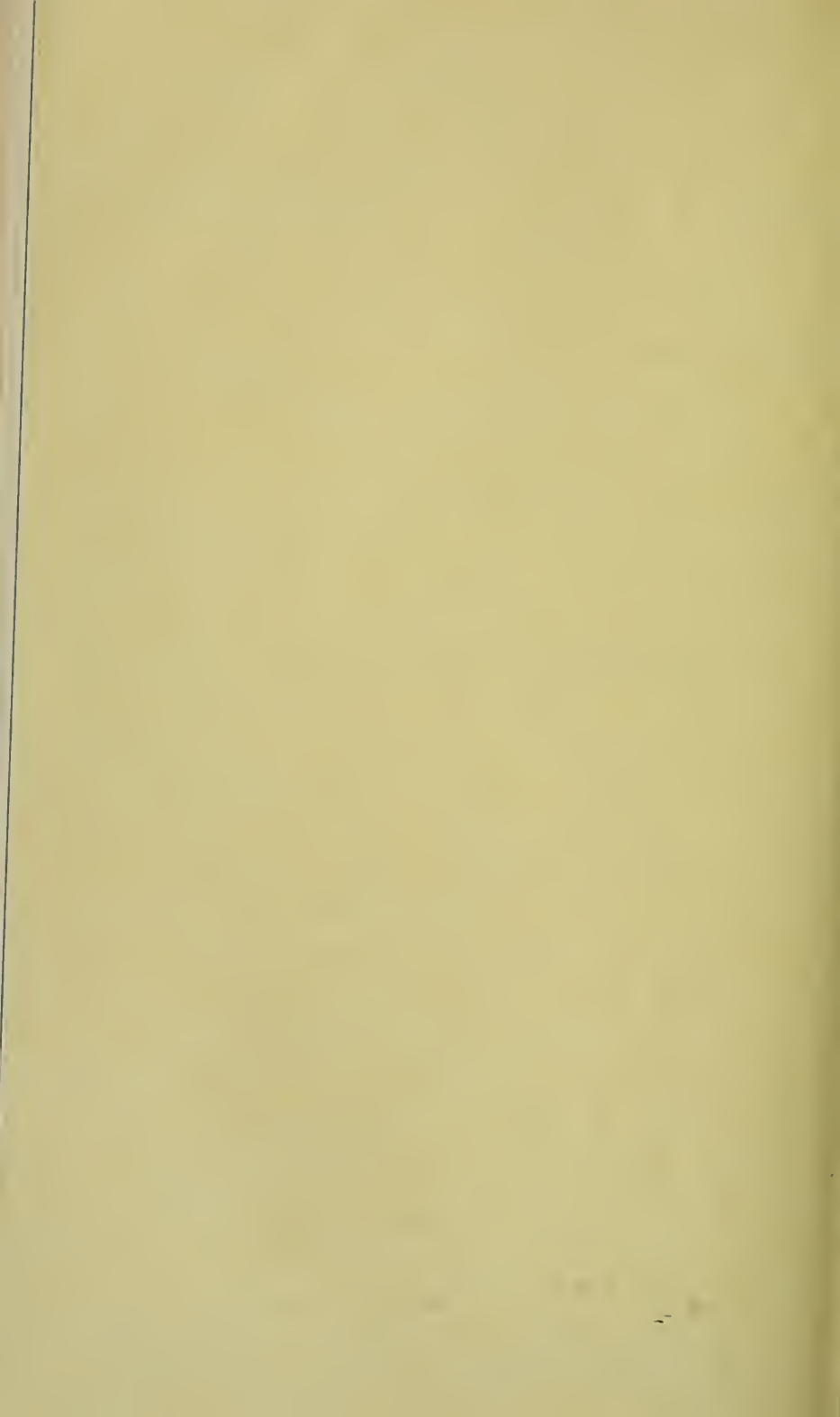
Assistant U. S. Attorney,

Chief of Criminal Division,

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

Attorneys for Appellee.

MAY 3 1949



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No. 12132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Brief Statement of the Case.

Appellant Walker was convicted by a jury of four counts of an indictment which originally consisted of eight counts. Count One had been dismissed. Walker was not charged as a defendant in Counts Two, Three and Four. Counts Five, Six, Seven and Eight, of which Walker was found guilty, were all substantially the same excepting as to the dates of the alleged sales of the narcotics, *i. e.*, September 16, 17, 20, and 22, all of 1948, and the amount of heroin charged to have been so sold on each of said dates.

The charges were brought under a provision of an Act frequently referred to as the "Harrison Narcotic Act," namely, that portion referring to "Unlawful acts in case of failure to register and pay special tax," more particularly, 26 U. S. C., Sec. 3224(a), "Trafficking."

It is believed that the record will reflect that no motion to dismiss or for a bill of particulars was made, and the first time the sufficiency of the indictment was questioned was when this appellant moved the trial court for admission to bail pending appeal, *i. e.*, subsequent to the verdict and sentence.

I.

The Indictment, and Particularly the Counts of Which the Appellant Was Found Guilty, States Offenses Against the Laws of the United States.

The argument advanced by appellant is that the indictment is fatally defective because it omits a specific charge "that appellant was required to register," or fails to include a clause somewhat as follows:—"being a person required by law to register." Appellant contends that a charge brought under this portion of the Act (26 U. S. C., Sec. 3224(a)) must so allege.

It is true that some indictments discussed by the appellate courts, brought under this portion of the Act, have utilized a phrase substantially as urged by appellant. It is, however difficult to see how such a phrase could have added to the instant indictment. The pertinent counts of the instant indictment, among other things, charge "without having registered with the Collector of Internal Revenue as a dealer in said narcotic * * *." And also charge "did sell" the specifically described narcotic without paying the special tax imposed by law on dealers. To go further would be to require a very technical overnicety.

- (a) The Modern Practice of the Federal Courts, Especially Since the Adoption of the Federal Rules of Criminal Procedure, Is to Consider the Adequacy of Indictments on the Basis of Practical as Opposed to Technical Considerations.

The Federal Rules of Criminal Procedure, Rule 7(c), effective March 21, 1946, provide as follows:

“(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

An inspection of the instant indictment, or any count thereof, will reveal that it meets the requirement of this Rule. The date is designated, the place of sale is designated, the defendant is named, and the person to whom he sold the narcotics is set forth. It then alleges that the defendant did not register with the Collector of Internal Revenue as a dealer and had not paid the special tax imposed by law on such dealers.

These allegations sufficiently earmark and identify the offense.

It is submitted that these allegations:

- (a) Inform the defendant of the offense of which he is charged; and
- (b) Are sufficiently certain to safeguard the accused from a second prosecution for the same act.

This Circuit, in the case of *U. S. v. Bickford*, 168 F. 2d 26 (C. C. A. 9), discussed an indictment with relation to the New Rules. In the *Bickford* case the District Court had held a perjury indictment to be insufficient because

it did not directly aver that the officer administering the oath had competent authority to administer same. In reversing the District Court's holding and in declaration of the sufficiency of the indictment, this Circuit stated as follows:

“The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7(c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical as opposed to technical considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. *Hagner v. United States*, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861; *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; *Hopper v. United States*, 9 Cir., 142 F. 2d 181. As observed in *Hagner v. United States*, *supra*, at page 433 of 285 U. S., at page 420 of 52 S. Ct., ‘it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.’ ”

More recently this Circuit again sustained the sufficiency of an indictment with relation to the requirements of Rule 7(c), Federal Rules of Criminal Procedure. See:

Flynn v. U. S., 172 F. 2d 12 (C. C. A. 9).

In the *Flynn* case an indictment for perjury merely alleged that the defendant, while testifying under oath, stated in open court certain material matter which he did not believe to be true, and then described the testimony of the accused. This was held to be sufficient under Rule 7(c), even though it did not contain the additional charge that the testimony given was in fact false. The court points out that the charges are stated in terms that protect the accused from the danger of being put in double jeopardy.

As an additional illustration of a recent ruling of the courts, we refer to a recent case decided by the Circuit, namely, *U. S. v. Ochoa*, 167 F. 2d 341 (C. C. A. 9). In that case, this court held that the omission in a murder charge of the phrase "with malice aforethought," as is provided in the statutory definition of murder (18 U. S. C., 452), was not bad. The court pointed out that the indictment in the *Ochoa* case was modeled after Form No. 1 in the Appendix to the Federal Rules of Criminal Procedure.

This Circuit has again reaffirmed a liberal interpretation in construing an indictment in the case of:

McCoy v. U. S., 169 F. 2d 776 (C. C. A. 9).

In the *McCoy* case this court sustained a challenged count of an indictment charging the presentation of false claims and for aiding and abetting the so doing. This court held that every particular relating to such charge need not be set out in the indictment and also pointed out that the indictment must be considered as a whole:

Pp. 779-780—

“Appellant’s construction of the indictment is too narrow. In the first place every particular relating to the charge is not required to be set out in the indictment, and it is not required that every possible combination of facts, which would constitute legal acts, should be negatived in it. *Hopper v. United States*, 9 Cir., 142 F. 2d 181. * * * The indictment must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated.”

The case of *Eisler v. U. S.*, 170 F. 2d 273 (C. A. D. C.), at pages 280-281, further illustrates the attitude of the courts in sustaining the sufficiency of an indictment, especially since the adoption of the Federal Rules of Criminal Procedure, *i. e.*, Rule 7(c).

It appears to be not only settled by statute but also by opinions, that in a charge brought under this particular phase of the Harrison Narcotic Act it is not necessary to negative the exemptions. To this effect—

26 U. S. C., 3224(c).

“* * * *Provided further*, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this part or subchapter A of chapter 23; and the burden of proof of any such exemption shall be upon the defendant. 53 Stat. 383.”

It appears to be well settled that it is not necessary for an indictment brought under this statute to negative the exemptions. To this effect:

Haggerty v. U. S., 52 F. 2d 11 (C. C. A. 8);

Taylor v. U. S., 19 F. 2d 813 (C. C. A. 8);

Rothman v. U. S., 270 Fed. 31 (C. C. A. 2).

Certain of the exemptions provided for by the Harrison Narcotic Act are to be found in 26 U. S. C., Sec. 3220. The first paragraph of this section reads as follows:

26 U. S. C., 3220 Sup. "Tax."

"On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, coca leaves, isonipecaine, or opiate, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30. As amended July 1, 1944, c. 377, §6, 58 Stat. 721; Mar. 8, 1946, c. 81, §6, 60 Stat. 39."

It should be noted that the above includes "every person" who "sells" or "deals in" opium and its derivatives.

The remainder of the aforesaid section then sets forth the tax required to be paid by "importers," "wholesale dealers," "retail dealers," "physicians," and others. Section 2551 of Title 26 provides for the exemption of preparations containing a limited narcotic content.

Section 3221 of Title 26 provides for the registration. Section 3227 of 26 U. S. C. provides for the applying of all provisions of law relating to special taxes imposed; and, finally, attention is invited to 26 U. S. C., Sec. 3228, under the heading "Definitions," wherein the broad definition of "persons" is set forth.

It should be noted that the section under which this charge was brought (26 U. S. C., Sec. 3223(a)) employs the phrase "any person."

The Harrison Narcotic Act is divided into many sections; it has also been amended and renumbered from time to time. It has several penal provisions. A penal provision of this Act that is more often used is 26 U. S. C., Sec. 2553. This provision pertains to selling, etc., of narcotics "except in the original stamped package or from the original stamped package." Frequently charges are brought both under 3224(a) and 2553 of Title 26.

In the case of *Taylor v. U. S.*, 19 F. 2d 813 (C. C. A. 8), among other things the court pointed out that a "dealer" is one who sells narcotics promiscuously or is a person who is willing to sell to anyone applying to purchase. In the *Taylor* case it was pointed out that several sales constituted a person "a dealer." In the instant case four distinct sales were made. It is believed that these four sales should constitute appellant Walker as a "dealer," and the very allegation that he "did sell," additionally charges dealing in the illicit product. The *Taylor* case further points out that once the sale is established by the

Government the burden is on the defendant to prove that he had registered and paid the special tax, and that the Government is not required to prove a negative if the defendant has in his possession the evidence of the affirmative. See page 816, *Taylor v. U. S.*, *supra*.

In the case of *Coleman v. U. S.*, 3 F. 2d 243 (C. C. A. 9), a charge brought under a somewhat similar phase of the Harrison Narcotic Act, this court held that the indictment was good although the same did not allege that the defendant (a physician) was a person required to register under Section 1 of the Act as it then read. We quote from the opinion, the following:

Page 244.

"The indictment does not allege that Coleman was a physician, or that he was registered or practicing as a physician. But it is not necessary for the pleader to allege that the sale or barter between Coleman and Curtis was not in the course of the practice of Coleman as a physician. An indictment drawn under the provisions of section 2 need not negative the existence of any of the conditions contained in section 2. In other words, if Coleman's acts were proper, because done by him while he was lawfully practicing as a physician, it became incumbent upon him to interpose that defense. *Weare v. United States* (C. C. A.), 1 F. (2d) 617; *Manning v. United States* (C. C. A.), 275 F. 29; *Hurwitz v. United States* (C. C. A.), 299 F. 449. Furthermore, the concluding proviso of section 8 of the act referred to provides that it shall not be necessary to negative any of the aforesaid exemp-

tions in any indictment or proceeding laid or brought under the act. It refers, not merely to the exemptions specified in section 8, but also to those mentioned anywhere in the act. Such is the expressed ruling of the Circuit Court of Appeals in *Nelson v. United States*, 298 F. 93, and in *Fyke v. United States*, 254 F. 225, 165 C. C. A. 513. We hold that the indictment is sufficient."

In the case of *Nigro v. U. S.*, 276 U. S., Sec. 332 (decided April, 1928), a case brought under Section 2 of the Harrison Narcotic Act as it then read, the Supreme Court held that the phrase "any person" includes all persons and not merely those who were required by Section 1 to register and pay the tax; and, in reference to the *Coleman* case, *supra*, it stated as follows:

Pages 349, 351.

"The Circuit Court of Appeals of the Ninth Circuit, in *Coleman v. United States*, 3 F. (2d) 243, expressly found that the first provision of §2 was not intended to be limited in its application to the persons required to register under §1.

* * * * *

"We are of opinion, therefore, that the provision which is contained in the first sentence of §2 of the Act is not limited in its application to those persons who by §; are required to register and pay the tax. We answer the first question in the negative."

See, also—

U. S. v. Wong Sing, 260 U. S. 18. -

Conclusion.

Appellee submits that the herein indictment is “a plain, concise and definite” statement of the essential facts constituting the offense charged, and is amply sufficient to protect the accused from a second prosecution for the same acts.

It is therefore submitted that the judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney;

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief of Criminal Division,
Attorneys for Appellee.



No. 12132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

LEO V. SILVERSTEIN,

837 Van Nuys Building, Los Angeles 14.

Attorney for Appellant.

FILED

MAY 11 1949

PAUL P. O'BRIEN,

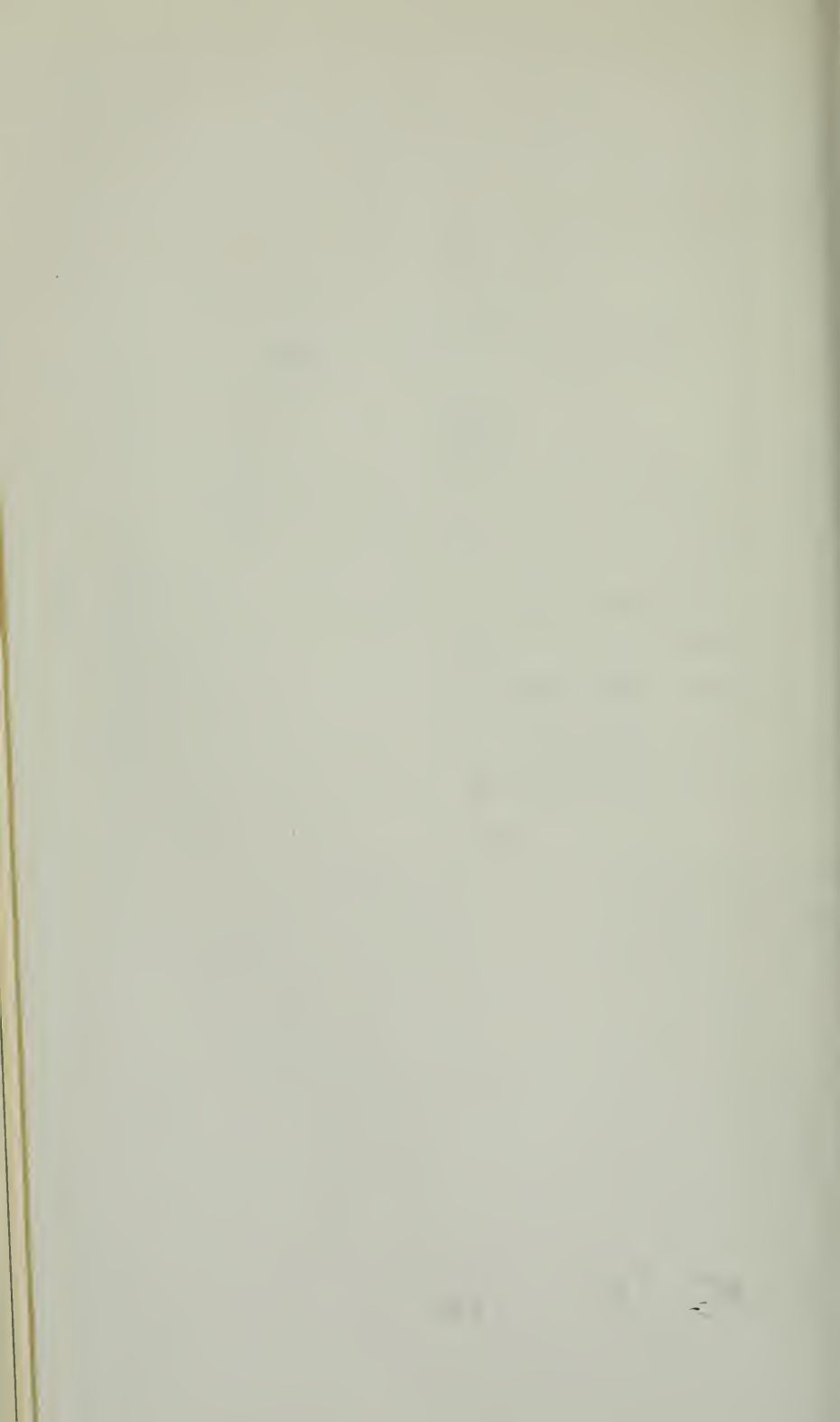
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No. 12132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

The Government's brief, in the humble opinion of appellant, does not answer the question presented to this Honorable Court to decide.

The only matter to be decided is whether the indictment states an offense against the United States. It appears appellee takes the position that Rule 7(c), Federal Rules of Criminal Procedure, cures any and all defects in the indictment. With this argument we cannot agree.

The Government having elected to prosecute under Section 3224(a), 26 U. S. C., should be held to plead properly under the section in order to state an offense.

Appellant has cited a number of cases in his brief in support of his contention, none of which have been questioned by appellee. We are not concerned with sections that pertain to the narcotic act that have no bearing on the issue here. We are concerned only with the issue

as to whether the indictment states an offense under Section 3224(a), 26 U. S. C.

A number of cases have been cited by appellee in its brief. In *U. S. v. Bickford*, 168 F. 2d 26 (C. C. A. 9), at page 27, it is said, "The court takes judicial notice of the power of its clerk." It is therefore contended that said case does not help us in determining the issue.

Also, *Flynn v. U. S.*, 172 F. 2d 12 (C. C. A. 9), the Court said, at page 13: "The counts are substantial in the language of the statute." The court said at page 14:

"This method of alleging the testimony of the accused to be false and corrupt was as effective as though the words 'false' and 'corrupt' had been used."

This case does not help in deciding the issues.

Also in *U. S. v. Ochoa*, 167 F. 2d 341 (C. C. A. 9), the Court said, at page 345:

"The indictment follows literally the language of the form for an 'Indictment for Murder in the First Degree of Federal Officer' set forth in the Appendix of forms to the Federal Rules of Criminal Procedure, Form 1. 18 U. S. C. A. following section 687.

"The Federal Rules of Criminal Procedure have the effect of law, and Rule 58 thereof gives the Appendix of Forms official illustrative status."

Certainly, this case should have no influence on the issue.

Also, *McCoy v. U. S.*, 169 F. 2d 776, all of the allegations necessary to be pleaded were pleaded and we have no argument in that regard.

Also, *Coleman v. U. S.*, 3 F. 2d 243, the indictment alleged the defendant sold the morphine without and not

in pursuance of a written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States. The indictment was based upon an entirely different section from the one that appellant has been charged with. It did include all of the essential elements to be pleaded under the act under which the indictment was drawn.

Also *Nigro v. United States*, 276 U. S. 332. The indictment was under a different section of the law. The issue determined does not decide the issue before this Honorable Court.

Also *United States v. Wong Sing*, 260 U. S. 18. The indictment was under different sections of the law and we believe the issue determined has no bearing upon the issue here.

Of the several cases cited by appellant in his opening brief (App. Br p. 3), it is believed that the case of *Stokes v. U. S.*, 39 F. 2d 440, is directly in point and favorable to the appellant's contention. We respectfully call the court's attention to this case. An analysis of the act is set forth in the opinion. The section involved is similar to the one at bar. The court stated at page 442:

"This limitation, therefore, would not be fatal to the indictment. It might limit the offense as charged against him under section 2, but, as the offense under section 2 refers to all persons, it would make no difference whether he was a person who had not paid the special tax or whether he was a person who had paid a special tax, unless he were a 'dealer,' which is not charged in count 1 of the indictment.

The defendant claims that count 1 of the indictment starts out in charging an offense under section

1 and completes the charge under the offense defined in section 2. This claim is perhaps correct, and would be fatal to the indictment if the first part of the indictment completed the charge of A under section 1 of the act by alleging that the defendant was a dealer within the meaning of the act. This, however, as heretofore stated, was not done."

Appellant in the case at bar was charged with being a dealer and it is respectfully contended that having failed to set forth the requirements of the statute by proper pleading, no offense has been stated. In the *Stokes* case it is said, at page 441:

"A, under section 1, has reference only to dealers, and dealers are only those persons who sell in or from original stamped packages. *Butler v. United States* (C. C. A.), 20 F. (2d) 570, 573. Therefore the offenses defined in A of section 1 are limited to dealers as defined in the act, while B, section 1, and the offense under section 2 refer to all persons."

In the case at bar there is no allegation that the appellant was one of the class required to register; there is no allegation that the heroin alleged to have been sold was in original stamped packages or from original stamped packages.

Conclusion.

It is respectfully urged that the judgment of conviction be reversed.

Respectfully submitted,

LEO V. SILVERSTEIN,
Attorney for Appellant.

No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD,

Appellant,

VS.

AMERICAN PACKING & PROVISION CO.,
a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Eastern Division

FILED

FEB 25 1949

PAUL P. O'BRIEN,
CLERK

No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD,

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Ogden, Utah,

Attorneys for Appellee. [2 *]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States Court for the District of
Idaho, Eastern Division.

No. 1464

AMERICAN PACKING & PROVISION CO.,
a corporation,

Plaintiff,

vs.

BERT RUUD,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

That the plaintiff is, and was at all times herein mentioned, a citizen of the State of Utah, being a corporation duly organized and existing thereunder, with its principal place of business at Ogden, Utah, and is, and was at all times herein mentioned, qualified to do and doing business in the State of Idaho; that the defendant is a citizen and resident of Bonneville County, Idaho. That the matter in controversy between the parties exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That at all times herein mentioned plaintiff was engaged in carrying on a general livestock slaughtering and meat packing business, with its principal slaughtering and processing plant at Ogden, Utah. That the defendant is, and was at all times

herein mentioned, engaged in carrying on a general ranching business near Irwin, Bonneville County, Idaho, and engaged in raising, feeding, buying and selling livestock for commercial purposes.

III.

That on or about the 4th day of November, 1946, plaintiff and defendant made and entered into a certain contract in writing, [3] a copy of which is hereunto attached, marked Exhibit "A", hereby referred to and by this reference made a part hereof. That plaintiff has at all times done and performed all of the conditions, stipulations and agreements on its part to be performed at the time and in the manner therein specified.

IV.

That on or about September 3, 1947, and within the time so provided for in said contract, plaintiff called for and demanded of defendant delivery to it of the cattle in said contract referred to, but defendant failed and refused, and still fails and refuses to deliver to plaintiff said cattle, or any of them.

V.

That by reason of the facts aforesaid and defendant's breach of the said contract, Exhibit "A", by his failure and refusal to deliver to plaintiff the said cattle as aforesaid, plaintiff was and is damaged in the sum of Thirty-one Thousand Twenty-six (\$31,026.00) Dollars, demand for which has been duly made and refused.

Wherefore, Plaintiff prays judgment against the Defendant for the sum of Thirty-one Thousand

Twenty-six (\$31,026.00) Dollars, together with interest thereon from September 3, 1947, for plaintiff's costs herein expended, and for such other and further relief as may be proper.

O. R. BAUM,
BEN PETERSON,
J. A. HOWELL,
D. L. STINE,
N. R. OLMSTEAD,
Attorneys for Plaintiff.

(Duly Verified.)

[4]

EXHIBIT "A"

CONTRACT OF SALE

This Agreement, made this 4th day of November, 1940, by and between Bert Rudd of Irwin, Idaho, hereinafter called the Seller, and American Packing & Provision Co. of Ogden, Utah, hereinafter called the Buyer.

Witnesseth:

Whereas, the Seller is the owner of certain steers now held upon Seller ranch near Irwin, Idaho, which said steers are branded O L Hip; and,

Whereas, the Buyer desires to purchase three hundred (300) head of said steers upon terms and conditions mutually agreed upon, which terms and conditions are hereinafter set out;

Now, Therefore, it is hereby mutually agreed between the parties hereto as follows:

(1) The Seller hereby agrees to sell and deliver to the Buyer, and the Buyer hereby agrees to purchase from the Seller three hundred (300) head of the steers hereinbefore described.

(2) The Buyer herewith pays to the Seller, receipt of which by the Seller is hereby acknowledged, the sum of Three Thousand (\$3,000.00) Dollars, as partial payment upon the purchase price of said steers, the full amount of which purchase price is to be determined at the times and in the manner set out in Paragraph 4 hereof.

(3) The Seller agrees at his sole expense to continue to care for and feed said steers in accordance with good ranching practice on his ranch near Irwin, Idaho, until called for by the Buyer as hereinafter provided, and to dehorn the same at his own expense at the proper dehorning time, and to deliver the same to the Buyer as hereinafter provided, free and clear of all liens and encumbrances of every kind and character. Seller's operations in connection with his caring for, feeding, and for dehorning said [6] cattle shall be subject to Buyer's inspection at any and all times, but Buyer assumes no responsibility in connection therewith.

(4) As and when called for by the Buyer, which shall be during the period from August 1, 1947, to October 1, 1947, the Seller agrees at his sole expense to deliver said three hundred (300) steers, and all of them to the buyer, F.O.B. Ogden, Utah. When delivered to the Buyer as aforesaid, the off car live weight of the same shall be determined, and

thereafter the same shall be slaughtered by the Buyer as soon as is reasonably possible in the orderly conduct of Buyer's business (the Buyer to be the sole judge thereof). Following the slaughter of the same they shall be graded in accordance with U. S. Department of Agriculture standards, and the dressed weight yield thereof, using approved packing house methods in determining the same, and by shrinking the warm weight three (3%) per cent, shall be ascertained, and the Buyer shall pay the Seller therefor at a price based on the dressed weight in accordance with which ever of the following formulas may be applicable:

A. For Those That Grade "A":

For all of said steers that grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Seller as the full purchase price therefor, upon the basis of the total dressed weight thereof at the rate of 29.66 cents per pound dressed weight.

B. For Those That Grade in Excess of Grade "A":

For all of said steers that grade in excess of Grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Seller, as the full purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, plus the then difference in Buyer's market price per pound dressed weight between Grade "A" steers and the grade of such steers. For example: If at the time of slaughter, the Buyer's then market price for

grade [7] "AA" steers is two (2) cents a pound dressed weight higher than for grade "A" steers, the Buyer shall pay the seller for the "AA" steers 29.66 cents, plus 2 cents, or a total of 31.66 cents per pound, dressed weight.

C. For Those That Grade Less Than Grade "A":

For all of said steers that grade less than Grade "A" in accordance with the foregoing standards, the Buyer shall pay the Seller, as the purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, less the then difference in Buyer's market price per pound dressed weight between grade "A" steers, and grade of such steers. For example: It at the time of slaughter the Buyer's then market price for grade "B" steers is two (2) cents a pound dressed weight less than for grade "A" steers, the Buyer shall pay the Seller for Grade "B" steers 29.66 cents, less two (2) cents, or a total of 27.66 cents per pound, dressed weight.

(5) It is understood that the Seller at this time has steers of the same type as those referred to herein in excess of the 300 hereby sold to the Buyer, and the Seller hereby guarantees delivery to the Buyer of the full count of 300 head, without any reservation, express or implied.

(6) Title to the aforesaid steers is to remain in the Seller until delivered to the Buyer as herein provided, and until so delivered they are held by the seller at his sole and exclusive risk and expense.

In witness whereof, the parties have hereunto set their hands this 4th day of November, 1946.

/s/ BERT RUDD,

Seller.

AMERICAN PACKING &
PROVISION CO.,

By /s/ E. W. FALLENTINE,

Its Vice President,

Buyer.

[Endorsed]: Filed Nov. 12, 1947. [8]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the above named defendant and for his Amended Answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation in said complaint contained, save and except as the same is hereinafter expressly admitted, qualified or explained.

II.

Admits paragraphs 1 and 2 of said complaint.

III.

Denies that the parties hereto made and entered into the contract described in paragraph 3 of said complaint and alleges that said purported contract never became effective or a valid and binding contract for the reason that the terms and conditions thereof were never agreed upon by the parties and

for the further reason that the same was never delivered, and in particular as follows:

(a) That after said alleged contract was signed by the defendant, it was transmitted by the defendant to the plaintiff through the United States mail with defendant's letter to the plaintiff accompanying same, wherein and whereby the defendant demanded of plaintiff that the provisions set forth in paragraph [9] 4 of said alleged contract providing for the shrinking of the warm weight of said cattle in the amount of 3% be eliminated from said alleged contract; that the delivery of said contract was a conditional delivery by the defendant to the plaintiff conditioned on the elimination of said provision from said contract; that the plaintiff did not at said time or at any other time accept said offer of defendant, or accept said conditional delivery of said contract, or agree to the elimination of said provision from said contract, and said alleged contract is not and never was in force or effect;

(b) That at the time said purported contract was signed by the parties, the defendant did not have 300 steers or any number whatsoever on his ranch, and did not have 300 steers or any number whatsoever, as described in said contract at any other place, or at all, all of which was at all times well known to the plaintiff, its agents, servants and employees, and it was understood and agreed that said purported contract was not to be in force or effect unless and until the defendant purchased cattle from other parties, which cattle, when and if obtained, the parties intended to make the subject matter of said contract but that, owing to no fault

on the part of the defendant, it was impossible for the defendant to purchase said cattle and by reason thereof said contract never was in force and effect.

IV.

Further answering said complaint and by way of further defense thereto:

Defendant denies that plaintiff has performed the conditions, stipulations and agreements of said alleged contract on plaintiff's part to be performed, and in particular, defendant alleges that the plaintiff failed and refused to pay the \$3,000.00 mentioned and described in said alleged contract as having been paid at the time of the execution thereof, and, by reason of such [10] failure on the part of plaintiff to pay such sum or any part thereof, there was a failure of consideration for said alleged contract and the same was rescinded and abandoned by the parties, and became, was, and is null and void.

V.

Further answering said complaint and as a further defense thereto:

Defendant alleges that after it became apparent that said cattle could not be obtained which defendant and plaintiff contemplated that defendant would purchase at the time said alleged contract was signed, and on or about the 8th day of December, 1946, the parties hereto entered into a new parol agreement under which plaintiff advanced to defendant the sum of \$3,000.00 to assist defendant in purchasing other cattle to be fed by defendant and sold and delivered to the plaintiff in the fall

of the year 1947; that defendant was unable to purchase cattle which would comply with the terms of said parol agreement and on or about the 11th day of September, 1947, defendant offered to return said \$3,000.00 to plaintiff with interest at the rate of six percent per annum, amounting to the sum of \$3,135.00, and defendant at all times since has been, and now is able, ready and willing to repay said amount to the plaintiff but that plaintiff refused, and still refuses to accept the same.

VI.

Further answering said complaint and by way of further defense thereto:

Defendant alleges that within the time provided for in the alleged contract described in plaintiff's complaint and notwithstanding that said contract had theretofore been rescinded and abandoned by the parties hereto, defendant offered to deliver to plaintiff 300 steers, but plaintiff refused to accept delivery thereof. [11]

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have and recover his costs and disbursements herein.

ALBAUGH, BLOEM, HILLMAN
ALBAUGH, BLOEM,

HILLMAN & BARNARD,
Attorneys for Defendant.

By /s/ RALPH L. ALBAUGH.

[Endorsed]: Filed May 25, 1948. [12]

[Title of District Court and Cause.]

TRANSCRIPT

This matter was tried May 25, 1948, before the Honorable William Healy, United States Circuit Judge, sitting at Pocatello, Idaho, without a jury.

Appearances: Messrs. Howell, Stine & Olmstead, Ogden, Utah; O. R. Baum, Esq., Pocatello, Idaho; Ben Peterson, Esq., Pocatello, Idaho; Milton Zener, Esq., Pocatello, Idaho, Attorneys for the Plaintiff. Messrs. Albaugh, Bloem, Hillman and Barnard, Idaho Falls, Idaho, Attorneys for the Defendant. [13*]

10 o'clock a.m. May 25, 1948

The Court: I think we better take up the motions first. I think there is a motion here to produce documentary evidence.

Mr. Albaugh: Also there is a motion to submit the case on the record. That is a motion by the plaintiff and we are resisting that. I think we should hear that motion first.

Mr. Olmstead: This motion by the plaintiff to submit the case to Your Honor for decision on the record made before Judge Brown, was filed by us, and as Mr. Albaugh states, is being resisted by the defendant. We conceive that under the law and under the rules there is a discretionary right to grant a new trial or to consider it upon the record previously made—

The Court: Without hearing from counsel on this motion I might say that I think it presents a situation somewhat analogous to a jury disagreeing,—a case being tried before a jury and the jury

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

disagreeing. I doubt that the matter could be presented on the former record. I might say further that as I understand this case, from the pleadings, there are many factual issues involved.

Mr. Albaugh: That is correct.

The Court: And I take it there will be considerable oral testimony. [16]

Mr. Albaugh: It was all oral testimony the last time.

The Court: It is of considerable assistance to the Court to have an opportunity to hear the witnesses and to see them and therefore I think that the motion of the plaintiff will be denied.

I understand there is an objection to the motion to file an amended answer, I will hear counsel on that.

(Whereupon the matter was presented to the Court by counsel.)

The Court: Is this the first amendment?

Mr. Albaugh: We amended by interlineation in paragraph 1, on page two as follows, adding the following words: "but that owing to no fault on the part of the defendant, it became impossible to obtain such cattle and by reason thereof said contract never became of force and effect." Paragraph two on page two of the answer was stricken and a paragraph inserted in lieu thereof, reading in the amendment, "that the plaintiff, on or about the 10th day of December, 1946, advanced the sum of \$3000.00 to enable the defendant to purchase cattle, but that it became impossible for the defendant to so purchase the same, due to no fault on the part of the defendant."

The Court: You have omitted certain of [17] the language of the former paragraph two; that is the only difference I see.

Mr. Albaugh: That is true, that was allowed by Judge Brown.

The Court: That is in your proposed amended answer?

Mr. Albaugh: Substantially the same.

The Court: In what paragraph?

Mr. Albaugh: Paragraph 5.

The Court: And subdivision B of paragraph three, it is elaborated on there.

Mr. Albaugh: That is substantially the same as paragraph 1 of page 2 of the original answer. That raises the same questions.

The Court: What about sub-paragraph A?

Mr. Albaugh: That is in explanation of the facts in connection with the alleged delivery or non-delivery of the contract.

The Court: Where do you set that up in the original answer?

Mr. Albaugh: In paragraph 3 page 1 of the original answer. That is the ultimate fact,—legal fact, now in sub-paragraph A it is set up in detail.

The Court: Paragraph four of the proposed amended answer, where do you have that in the original?

Mr. Albaugh: That in our opinion is in [18] our general denial. They allege that they performed everything by them to be performed and we deny that in the old answer. We also show payment of the \$3000.00 to purchase cattle but we do not admit either in the old answer or the new

that the \$3000.00 was advanced under this contract in suit here. The same question is raised in both answers.

The Court: I will hear from the plaintiff.

Mr. Olmstead: We object to paragraph five, particularly in that they are bringing in a new theory, they plead failure of consideration now and abandonment and rescission.

The Court: It seems to me that several of the matters that are included in the proposed amended answer might have been gone into although the language of the original answer is somewhat sketchy. As to paragraph five of the proposed amended answer I have some doubts whether it presents a substantial issue, but in view of the fact that this case is tried to the Court rather than to a jury and that you have gone over the ground once, my tendency is to permit this amendment for what it may be worth, and that will be the order, that the amendments are permitted. Do you wish to make a motion to make the answer more definite and certain? [19]

Mr. Olmstead: No we don't wish to make a motion.

The Court: You have once tried this case and I doubt very much that you would be surprised.

Mr. Olmstead: We didn't go into the question of a subsequent contract before Judge Brown. Now, Your Honor, there is a demand for this Company to produce certain records and we have a demand to produce a certain letter.

Mr. Albaugh: I think we have that letter. We don't deny that.

The Court: Then I understand that the demand will be met by counsel before this case is over.

Mr. Albaugh: Yes, Your Honor.

The Court: I have some difficulty in seeing the materiality of this evidence that you ask to be produced.

Mr. Barnard: The motion was made because of the procedure followed before Judge Brown. On the question of damages Judge Brown ruled that it was necessary for the plaintiff to show what they paid for cattle on the market when they claimed that this contract was breached and that they had to replace the cattle which they should have received under the contract by going on the market and buying cattle. As it developed in the trial the plaintiff did not produce any record to show what they purchased, but [20] said they purchased cattle at a certain price; we didn't think that was satisfactory. They are able to show the market price because plaintiff was buying cattle regularly upon the market, the Ogden market, and they have done for years. They have the records of the purchases of cattle during the time in question while they claim they were replacing the cattle they claim that had to be replaced. That is the purpose of the demand. If the plaintiff does have the records showing what they paid for cattle we think that record should be produced.

The Court: Of course, you don't limit your demand to steers comparable to those to be delivered under the contract.

Mr. Barnard: They are not identified sufficiently so that we can determine what they are.

The Court: Is it your position that the plaintiff was entitled to make demand for the cattle and that you did make demand?

Mr. Olmstead: Yes, sir.

The Court: Your view is that the market value has to be established as of the date of the demand?

Mr. Barnard: September 3rd or thereabouts, a few days one way or the other.

Mr. Olmstead: We went on the theory that where there is a market and the market value is shown——

The Court: ——that is the uniform sales [21] Act.

Mr. Olmstead: Yes,—we argued that the contract price was thus and so, and that the market was thus and so; we have established our damages as normally the difference between the contract price and the market price. Our position is that the damages is controlled and covered by the statute and these records are irrelevant and immaterial. Whether we went on the market or filled this contract from cattle on hand is immaterial.

Mr. Albaugh: I am inclined to think that the statement of the law made by counsel is a correct statement but Judge Brown followed the Montana line of decisions which is followed by Oklahoma and other states. Judge Brown took a position adverse to the plaintiff and the plaintiff then introduced evidence of what they paid for cattle.

The Court: What law do you gentlemen concede to be controlling. Are you agreed that the law of Utah or the law of Idaho is controlling here?

Mr. Olmstead: The law of Idaho.

The Court: Do you concede that?

Mr. Albaugh: I know of no difference, Utah has a uniform sales law.

The Court: The motion is very broad. It is not limited to the Ogden Market. The bearing these other documents would have on the market price at Ogden [22] and the question of damages would be very slight.

Mr. Barnard: I would like to amend the motion to limit the records to purchases made on the Ogden Market and also limit the time from August 26 to October first. The testimony of the previous case was that they were purchasing cattle until about November. I think it was the testimony of Mr. Fallentine. In any event during the time the delivery was called for under this contract. Perhaps this motion should be restricted to October, not later than that, and on the Ogden Market, we would like to limit our motion.

The Court: Are these records available?

Mr. Olmstead: They are available, all that they demanded.

The Court: The motion will be granted.

Mr. Olmstead: On the condition that we turn the whole **thing over to them**.

Now, Your Honor, do you want to make the record as to a new trial.

The Court: I don't take it that **this comes** as a new trial, but if you think so, then in view of the death of Judge Brown **prior to a decision and** the fact that there was received a large amount of oral testimony on the former trial, **it is ordered that**

the case be retried at this time. You may have an exception to that ruling. [23]

Mr. Olmstead: We have a large box of records covering all of the sales for this entire time. We have gone through our entire records and picked the ones we thought was covered by the demand. If we have to go through and separate them again it will take some time.

The Court: I think you can turn it over to the defendant and counsel can separate them and take what they want according to the order of the court.

If that is all on these motions we will proceed.

Mr. Olmstead: We will call Bert Ruud.

BERT RUUD

Called as a witness by the plaintiff, after being first duly sworn, testified as follows:

Cross-Examination

By Mr. Olmstead.

Mr. Olmstead: May the record show that I am calling the defendant as an adverse party in this action, which is permitted under the Federal Rules. The rules provide that he is called for cross-examination and that we are not bound by his testimony.

The Court: Very well.

Q. Your name is Bert Ruud. A. Yes, sir.

Q. You reside where, Mr. Ruud?

A. Irwin, Idaho.

Q. What is your occupation? [24]

A. Rancher.

Q. How long have you been engaged in ranching? A. Thirty years.

Q. What is the size of your ranch at Irwin, Idaho? A. About a thousand acres.

(Testimony of Bert Ruud.)

Q. Where is it located?

A. On the Snake River, in Bonneville County.

Q. How far from the Wyoming line?

A. I have some that joins the Wyoming line.

Q. So that your ranch is adjacent to and close to the Wyoming line, but on the Idaho side?

A. Yes, sir.

Q. Mr. Ruud will you examine exhibit 1 which is marked for identification, particularly the last page thereof and state whether or not your signature appears thereon?

A. Yes, it does.

Q. I invite your attention to the writing in ink above the signature in connection with the date and I will ask you if you wrote the figure four after the word November,—no, the figure four in connection with the date, did you write that?

A. I cannot remember, just like I testified before, whether I did or not, I can't remember.

Q. Does it appear to be in your hand writing?

A. It looks like the same ink but I cannot say whether I wrote it or not. [25]

Q. Does it appear to be in your hand writing?

A. There is no writing just 4 and th.

Q. Now on the first page look at the writing following the word branded in the description and state whether you wrote the words O L Hip in that blank space?

A. I think I did.

Q. At the time you placed your signature on that contract you inserted the brand description and then perhaps you dated the contract, is that correct?

A. I think that is correct.

(Testimony of Bert Ruud.)

Q. What is the date the contract bears?

A. The 4th day of November, 1946.

Q. Would you say that you signed it on or about that date? A. I think I did.

Q. You think you did about that date.

A. Yes, sir.

Q. What did you do with the contract after you signed it?

A. I believe I mailed it to Mr. Louis Salerno.

Q. State who he is?

A. He is the agent dealing with me on buying the cattle.

Q. You know him as the cattle buyer for the plaintiff? A. Yes, sir.

Q. You think you sent it to him?

A. I am certain I did.

Q. At Ogden? [26]

A. I think I wrote a letter. There was a letter came with the contract from him and I included it with a letter back to him about things I didn't understand about the contract.

Q. This was November 4th.

A. I think the letter was dated November 3rd, and this is dated November 4th in the records here.

Q. What steers did you own at the time of signing that exhibit? A. None.

Q. Did I understand you to say none.

A. None on the ranch. This calls for steers on the ranch.

Q. How many did you own?

A. I probably had a few. I was buying and sell-

(Testimony of Bert Ruud.)

ing all of the time. I would have to search the records.

Q. Do you have such records?

A. I think I have sales records, I don't keep purchase records. I sold several cattle about that time.

Q. Mr. Ruud, what were the quality of the steers covered by that contract?

Mr. Albaugh: That is objected to as incompetent, irrelevant and immaterial, the contract speaks for itself, and it is not proper cross-examination.

The Court: Overruled.

A. We couldn't tell the quality until we had the cattle purchased.

Q. Do you recall the taking of your deposition in this case. I think it was on February 24, 1948?

A. I think I remember it. [27]

Q. Do you recall that occasion?

A. Yes, sir.

Q. Do you recall in the course of the taking of that deposition you were asked "what kind of cattle were you selling under the terms of this contract to the packing company"? You answered: "The original deal as we drew it up, would have been good cattle, had we completed the deal." Do you recall giving that answer? A. Yes, sir.

Mr. Albaugh: I move to strike that for the purpose of making the objection, and I object for the reason that it is an attempt to vary the terms of a written contract. There is an attempt to reform the contract and the testimony is not admissible unless

(Testimony of Bert Ruud.)

it is pleaded. They must plead and show a prior agreement. Before this testimony can go in there must be a pleading.

(Further argument of counsel not reported.)

The Court: This contract is in a measure ambiguous. I think the objection will be overruled.

Q. Do you recall making that answer that the steers were good quality.

A. I would try to buy good quality steers.

Q. Do you recall answering in your deposition that the steers covered by the contract were good quality steers?

Mr. Albaugh: I object to this method and [28] manner of questioning a witness on a deposition. I ask that the deposition be handed to the witness, and I make the further objection that it is improper cross-examination.

The Court: I think he should be given a copy of the deposition, and the objection that it is improper cross-examination is overruled.

Q. Refer to page 28 of the deposition, and the answer I am referring to is the fourth answer from the bottom of the page.

A. May I ask a question.

Mr. Olmstead: Just answer the question, Mr. Ruud.

Q. At the time you gave this deposition, you made that answer.

A. It says here "A good quality," does that mean a good quality or good quality.

The Court: The letter A probably stands for answer.

(Testimony of Bert Ruud.)

A. I said "that's right."

Q. Read the answer above that: "The original deal as we drew it" and so forth.

A. "The original deal as we drew it up, would have been good cattle, had we completed the deal."

Q. Is that your answer at the time of taking the deposition? A. Yes, sir. [29]

Q. What were the weights of the cattle at that time?

Mr. Albaugh: I renew my objection, it is incompetent, irrelevant and immaterial and it is an attempt to vary the terms of a written contract.

Q. The question in the deposition is "What size of cattle."

Mr. Albaugh: Now I make the objection.

The Court: Objection overruled. I might state that it is my inclination to admit the evidence rather freely and counsel may make their objection, and you can specifically point out these matters to the Court either in argument of briefs.

Mr. Albaugh: May it be understood that my objection goes to this line of questioning concerning the cattle, and any oral agreement, or would the Court prefer that I make the objections as the questions are asked?

The Court: For the present I would prefer the latter procedure.

A. Yes, I answered that, I said about five hundred.

Q. Five hundred and twenty-five pounds.

A. Yes, I just didn't turn the page to see the twenty-five.

(Testimony of Bert Ruud.)

Q. Now, Mr. Ruud, in the course of your ranching operation prior to the making of this contract you had fed a good quality of cattle on your ranch?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: Overruled. [30]

A. I have fed all kinds of cattle and all sizes.

Q. Including good cattle? A. Yes.

Q. Will you examine exhibit 2 and state what it is?

A. This is a letter that I explained to——

A. No, not what it contains, just state what it is, Mr. Ruud. A. It is a letter.

Q. What is the date of that letter?

A. November 3.

Q. November 3, 1946? A. Yes, sir.

Q. Is that the letter you forwarded to Mr. Salerno at the time you sent the contract?

A. Yes, sir.

Mr. Olmstead: Now, if the Court please, I have proved one signature to that contract, may I ask the witness to step down so that I may prove the other signature?

Mr. Albaugh: We admit that it is Mr. Fallentine's signature, and that he is the vice president and General Manager of the plaintiff corporation.

Mr. Olmstead: I think we offer this exhibit now,—exhibit 2.

The Court: Do you have any objection.

(Testimony of Bert Ruud.)

Mr. Olmstead: I beg the Court's pardon, it is exhibit 1, the contract I am offering at this time. [31]

Mr. Albaugh: I would like to question the witness on the letter.

The Court: Letter from whom to whom?

Mr. Albaugh: Mr. Ruud to Mr. Salerno.

The Court: Very well.

Q. (By Mr. Albaugh): Did this accompany the contract that you mailed to Mr. Salerno?

A. Yes, I think it did, the contract is dated the 4th and this is dated the 3rd but it runs in my mind that I sent them both at the same time.

Q. Just look at the letter to refresh your mind, Mr. Ruud, read the first portion of that letter.

A. Yes, it says I am inclosing the contract.

Q. That was mailed with the contract?

A. Yes, sir.

Mr. Albaugh: At this time if the Court please, we offer exhibit 2.

The Court: Does the plaintiff have any objection.

Mr. Olmstead: None.

The Court: That may be admitted.

(Testimony of Bert Ruud.)

DEFENDANT'S EXHIBIT NO. 2

Irwin, Idaho, Nov. 3, '46.

Louie Salerno,
Ogden, Utah.

Dear Sir;

I am enclosing the contract signed but would like the place in paragraph four (4) where you recite that you will shrink the warm carcass 33%.

three percent as this part of our verbal agreement was not agreed on and if this was allowed and me deliver cattle to plant it would amount to roughly \$10, per head and the yield would be lowered to cut the price also.

As I understand the price of 29.66 on a yield of 59 will also apply to a yield of higher or lower as we agreed on that is if the cattle yield 60 the price would raise according and if they yield 58 the price will be lower the same way.

I will sign the contracts but kindly erase the 3% shrink on hot weight as this will cost me roughly \$6. per head and I think that I should be allowed hot weight when I deliver the cattle and guarantee 59 and A Grade and I also have the best bunch of steers I ever fed Have sorted all the rough ones and large off steers out have two bunches to receive but the snow storm delayed some but will get them soon.

Kindly sign the Copy and mail check to me at Irwin when and if you can at once I may be at the

(Testimony of Bert Ruud.)

Falls Wed and you can hand it to me there will be at Jackson with the cattle untill then.

Yours truly

/s/ BERT RUUD.

I think I should hear your objection on the admission of the contract. You may go ahead with your objection.

Mr. Albaugh: We object to exhibit 1 for the reason that the letter accompanying the [32] contract shows on its face that there was no meeting of the minds at that time; that the contract was not to take effect at that time; that there was no legal delivery only manual delivery of the contract. The law is well settled that when a letter accompanies a contract it becomes a part of the contract, they are read together and this letter shows that there was no legal delivery of the contract. The contract was not in effect and not to take effect until certain alterations were made, the letter recites: "I am inclosing the contract signed but would like to place in paragraph four where you recite that you will shrink the warm carcas three per cent as this is part of our verbal agreement was not agreed on and if this was allowed and me deliver cattle to plant it would amount to roughly ten dollars per head and the yield would be lowered to cut the price also." Then in the next to the last paragraph it says: "I will sign the contracts but kindly erase the three per cent shrink on hot weight as this will cost me roughly \$6.00 per head and I think that I should be allowed hot weight when I deliver the

(Testimony of Bert Ruud.)

cattle and guarantee fifty-nine and A grade." I have plenty of authorities on that point.

The Court: I think that presents a question of law that you may argue in due time, but for the present I will admit the contract.

Q. The contract provided for a basic price of \$29.66 dressed [33] weight following slaughtering?

Mr. Albaugh: We object to this as not the best evidence. The contract would be the best evidence.

The Court: Overruled.

Q. You recall that?

A. Yes, sir,—may I explain.

Q. Was that arrived at from a basic live-weight figure?

A. It was arrived at as you drew it up.

Q. Was it arrived at from a live-weight figure?

A. I don't know how you computed it. It was the way you wrote it up. The original deal was 17 and a half a pound.

Q. The live-weight was seventeen and a half cents a pound? A. Yes, sir.

Q. And that was converted into dressed weight price in the contract?

A. That is your theory, I had nothing to do with that.

Q. Then I understand that your idea was that the price of the cattle was seventeen and a half cents per pound live-weight? A. Yes, sir.

Mr. Albaugh: I object to this as incompetent, irrelevant and immaterial and not proper cross-examination.

(Testimony of Bert Ruud.)

The Court: Objection is overruled. It is explanatory of the situation.

Q. Do you know anything about the percentage of dressed weight yield compared to live-weight in relation to the various types and weights of cattle? [34]

Mr. Albaugh: Objected to as not proper cross-examination.

The Court: Overruled.

A. I cannot say that I do.

Q. Have you had an experience in determination of dressed weight yield to live-weight.

A. This is the only such deal I ever got into and they tried to explain it to me.

Q. You have sold cattle on a dressed weight basis?

A. I have bought cattle for different packers and they have explained it, but not my own cattle.

Q. You don't know what a normal good quality steer would dress out?

A. I would not be an expert.

Mr. Olmstead: That is all.

Mr. Albaugh: No questions at this time.

Mr. Olmstead: There are a few more questions if I may go ahead.

The Court: Very well.

Q. (By Mr. Olmstead): The cattle that were covered by the contract were cattle which were to be fed by you until ultimately they were delivered to the Packing Company.

Mr. Albaugh: Objected to as incompetent, ir-

(Testimony of Bert Ruud.)

relevant and immaterial and not proper cross-examination. It is also an attempt to vary the terms of the contract. [35]

The Court: Overruled.

A. They were to be pastured by me.

Q. They were what is normally known as feeder steers.

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial, not proper cross-examination and an attempt to vary the terms of the written contract. It is not competent under the pleadings in this case.

The Court: It is quite obvious they were feeder steers. Overruled.

A. They were steers that we could buy to fill the contract. The contract says steers.

Q. And then you were to feed until delivery to the packing company next fall.

A. I didn't have a feeding plant, I have a pasture.

Q. Then you were to maintain a pasture and pasture them? A. That is right.

Q. Under normal feeding conditions, taking good quality steers in November, 1946, weighing approximately five hundred twenty-five pounds, what would those steers have weighed at the time of delivery to the packing company in August or September, 1947?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination. No foundation is laid for it.

(Testimony of Bert Ruud.)

The Court: It calls for the weight under normal conditions, that is the way the question is framed, under normal conditions I think it should refer to the conditions under this contract.

Mr. Olmstead: May I reframe the question?

The Court: Yes.

Q. Under conditions which existed upon your ranch for the growing, pasturing and maintaining of cattle what would steers weighing 525 pounds in November, 1946, have weighed as a consequence of your maintaining and caring for them on your ranch in August or September, 1947?

Mr. Albaugh: May the same objection made to the last question show as applying to this question.

The Court: Yes.

A. That would depend on two things. Had I purchased the cattle at one place they might have weighed more than if I had purchased them and fed them at another. They might have weighed less in Montana. They generally gain enough to pay for their feed. If I buy a five hundred pound animal he may weigh six hundred in the spring; in the pasture I may put on a hundred and fifty pounds.

The Court: This contract provides that you will care for the steers in accordance with good ranching practice on your ranch at Irwin, Idaho, now, answer that question.

A. They gain approximately a hundred fifty pounds on my ranch, they do that every year.

Q. Maintaining steers of the type and quality mentioned, on that ranch from November, 1946,

(Testimony of Bert Ruud.)

until August, 1947, then, the [37] gain would be a hundred fifty pounds?

A. On my ranch, yes.

Q. On your ranch. A. Yes, sir.

Q. Do you recall at the time of the taking of the deposition you said that you had in mind filling this contract with so called Peterson cattle?

Mr. Albaugh: What page is that?

Mr. Olmstead: I am turning to page 32 now.

A. Yes, sir.

Q. Do you recall at that time that you testified that these cattle, under normal conditions being conditions such as you had in mind, would have weighed nine hundred pounds at the time of delivery to the Packing Company?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination and also an attempt to vary the terms of a written contract,—an effort to explain and modify the contract and there being no pleadings upon which to base such evidence.

The Court: Overruled.

A. What line is that on?

Q. That is the third question from the top of the page and your answer: "Under normal conditions, such as you as you had in mind"—Now what would those conditions be?

A. Well, on that deal had it been completed they were to [38] feed the cattle during the winter and I was to feed them during the summer. That is the deal on the Montana cattle.

(Testimony of Bert Ruud.)

Q. They are the cattle you had in mind at that time to fill the contract with?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination, and it is an attempt to explain this written contract.

The Court: Overruled.

A. Those were the cattle that I was trying to buy.

Q. To fill this contract? A. Yes, sir.

Q. And those would have weighed nine hundred pounds at that time.

A. Had they had a good winter, yes, I think they would have done that.

Mr. Olmstead: That is all.

Redirect Examination

By Mr. Albaugh.

Q. When you said they would gain a hundred and fifty pounds on your ranch, that was confusing, can you explain that?

A. We live in a snow country. We have three months of Summer and we have a good pasture during that three months, we keep them during that time and after that the grass freezes.

Q. Do you have hay to feed three hundred steers?

A. No, we never keep them there, they couldn't be fed there.

Q. You set this gain up to nine hundred pounds and then said they gained or would gain a hundred and fifty pounds on [39] the ranch, how do you figure that winter gain in Montana?

(Testimony of Bert Ruud.)

A. That would be for six months on hay against three months on grass.

Q. Had Mr. Salerno been on your ranch in the Fall of 1936?

A. Yes, he had been there to look at some fat cattle that I was trying to sell him.

Q. Did Mr. Salerno know you had no feed on your ranch? A. Yes, sir.

Q. And did he know you had no cattle there at the time the contract was signed?

A. Yes, I spoke to him, and at the time the contract was signed he said he knew that there was no cattle on the ranch.

Q. He knew that. A. Yes, sir.

Mr. Albaugh: That is all at this time.

Mr. Olmstead: That is all.

J. J. SMITH

Called as a witness on the part of the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Judge Baum.

Q. You reside where, Mr. Smith?

A. Idaho Falls, Idaho.

The Court: May I ask if this deposition which has been referred to is in evidence?

Mr. Albaugh: None of the depositions are. [40]

Judge Baum: They were published but not in evidence.

Q. What business are you in, Mr. Smith?

A. Brand inspector.

Q. For whom?

(Testimony of J. J. Smith.)

A. The states of Montana and Wyoming.

Q. Where do you maintain your office?

A. Helena, Montana, and Cheyenne, Wyoming.

Q. Your local office. A. Idaho Falls, Idaho.

Q. Do you have an office there?

A. Yes, sir.

Q. Carrying on business for your employers at that point? A. Yes, sir.

Q. Are you acquainted with Bert Ruud, the defendant in this case? A. Yes, sir.

Q. How long have you been acquainted with him? A. Probably six years.

Q. Are you acquainted with his ranch near Irwin, Idaho? A. Yes, sir.

Q. Have you been on it? A. Yes, sir.

Q. Were you acquainted with it in the late Summer of 1947? A. Yes, sir.

Q. And were you there at that time?

A. Yes, sir. [41]

Q. Did you see any livestock there on the ranch at that time?

A. Yes there was stock there.

Q. Some steers. A. Yes, sir.

Q. How many head?

A. Around two hundred and ninety or three hundred head.

Q. Do you know the quality of those cattle you saw? A. Yes, sir.

Q. How long have you handled and inspected cattle?

A. How long have I been inspecting cattle?

Q. Yes.

(Testimony of J. J. Smith.)

A. Twenty years or so, and maybe twenty-five.

Q. During these twenty years what has been your general occupation?

A. Inspecting cattle for brands mostly.

Q. Did you note any brands on those cattle you saw on Ruud's ranch? A. Yes, sir.

Q. Now, Mr. Smith, did you later see some of those cattle? A. Yes, sir.

Q. And where was that?

A. At the Idaho Falls Market.

Q. Do you recall when that was?

A. I have the date but I don't just remember it now. I have the date that I seen them.

Q. Was it in the Fall of 1947, along about August? A. Yes. [42]

Q. How were they branded,—the cattle you saw there?

A. I believe the ones that came in August O V O left hip.

Q. Do you know what those cattle weighed?

A. No, sir, I don't.

Q. Are you in a position to give your opinion as to the weight of those cattle in the Idaho Falls yard at that time?

Mr. Barnard: We object to that as incompetent, irrelevant and immaterial unless we know whether these cattle are claimed to be the subject matter of the contract. The testimony shows that Mr. Ruud buys and sells cattle all of the time. We don't know whether they claim these cattle had any connection with the contract or the subject matter of the contract.

The Court: Objection overruled.

(Testimony of J. J. Smith.)

A. I would say they weighed around nine hundred thirty pounds; that is my opinion.

Q. In whose name were those cattle sold that you saw at Idaho Falls stock yard. Those nine cattle I am speaking of now.

A. Bruce Porter, Jackson, Wyoming.

Q. Who was Bruce Porter? Was he a cattle man?

A. He is a producer of livestock who also has a Drugstore.

Q. What association or whose yard was it that you saw these cattle handled in, in August, 1947, in Idaho Falls?

A. The Idaho Livestock Auction Company.

Q. Now, what was the quality of these cattle?

A. Very good quality steers. [43]

The Court: Did you say they were steers that belonged to Mr. Porter?

A. They were in Mr. Porter's name.

Q. Did you have any conversation with the defendant in reference to the nine head of cattle at that time? A. Yes, sir.

Q. State where that conversation occurred?

A. Close to my office in the yard.

Q. Who else was present? A. I don't recall.

Q. What did Mr. Ruud say to you at that time, with reference to those nine head of cattle?

A. He said he purchased them from Mr. Porter some time before and to send the money to Porter, that he had mislaid the Bill of sale, and for me to let the money go on to Porter and then Porter would later send it to him. He said that Porter was the former owner of the cattle.

(Testimony of J. J. Smith.)

Q. How did you handle the money at that time. How did you mark it,—I mean does the association or company pay out money to people in Wyoming until you O. K. the sale? A. No, they don't.

Q. What did you do?

A. I held the check for some time and later got the bill of sale given by Porter to Ruud.

Q. That is Mr. Ruud the defendant here?

A. Yes, sir. [44]

Q. Then what happened?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial. There is no connection shown between these cattle branded O V O and the cattle covered by this contract?

The Court: Overruled.

(No answer was made to the question.)

Q. When you were talking to Mr. Ruud who did Mr. Ruud say the 9 cattle belonged to?

A. That they belonged to him but were carrying Mr. Porter's brand. They belonged to Mr. Ruud, that is what he told me.

Q. Did you see this exhibit before?

A. Yes, at the former trial here.

Q. Did you see it in August, 1947?

A. No, I don't know that I did. Oh. I imagine that I did, yes, I imagine I have.

Q. What did you do with the cattle Mr. Smith?

A. We let them sell the cattle and held the proceeds of the sale. We don't hold any cattle; we let them sell the cattle and hold the proceeds.

Q. Will you look at Exhibit 7 and state whether

(Testimony of J. J. Smith.)

you ever saw that before? A. Yes, I have.

Q. What is it? [45] A. A check.

Q. Where did you see that check?

A. When I put a hold on this money. That is attached there and kept there until it is mailed out to whoever we may give the proceeds to.

Q. Is that check in payment for these nine head of cattle? A. Yes, sir.

Q. Whose endorsement is on the back of that check?

Mr. Albaugh: Objected to as not being the best evidence. The check would be the best evidence.

The Court: Overruled. He may answer if he knows.

A. Bruce Porter had endorsed this check?

Q. Who else? A. Mr. Max Ruud.

Judge Baum: We move the admission of exhibits six and seven.

Mr. Albaugh: We object as they don't tend to prove any issues in this case. There is no connection between the exhibits and the cattle described in the contract. We don't know that the plaintiff is claiming these cattle were covered by the contract. They are incompetent, irrelevant and immaterial at the present time.

The Court: Overruled.

The Clerk: Do you gentlemen want these marked exhibits 2 and 3? [46]

Mr. Olmstead: Exhibit Number 6 will be marked as number three now, and exhibit 7 will be marked number four, is that right?

The Court: That is right.

(Testimony of J. J. Smith.)

PLAINTIFF'S EXHIBIT No. 3

[Idaho Livestock Auction Co. Statement]

9 Idaho Falls, Idaho, 8/6/1947

Sold for Account and Risk of: Bruce Porter, P.O. Jackson, Wyo.

Cattle	Description	Price	Weight	Purchaser	Amount
8	Wf Strs.	23.90	8150	American 8	\$1,947.85
1	Wf Str.	25.40	1185	American 8	300.99
—					
9			9335		

\$2,248.84

Truck or Freight, including Charges on Road.....\$28.00

Commission 15.75

Brand Inspection90 44.65

Net Proceeds.....\$2,204.19

Check to Hold No. 8293

PLAINTIFF'S EXHIBIT No. 4

IDAHO LIVESTOCK AUCTION CO.

No. 8293

Custodian Account for Shippers Proceeds

Idaho Falls, Idaho, Aug. 6, 1947

Pay to the Order of BRUCE PORTER.....\$2204.19

When the warranty endorsement on reverse side hereof is properly
executed. (This draft not valid if endorsement is altered)

Idaho Livestock Auction Co.....\$2204 Dols 19 cts

Market Agency Account

By /s/ O. I. BLAIN

To Bank of Eastern Idaho

Idaho Falls, Idaho

By endorsing this instrument payee warrants that the livestock paid
for hereby was owned by me/us free of all incumbrances when
delivered to and sold for my/our account

[Signed] BRUCE PORTER
Seller

[Signed] MAX RUUD

(Testimony of J. J. Smith.)

Q. Mr. Smith, do you know the territory in which the ranch of Mr. Ruud is located?

A. Yes, sir.

Q. Is that deemed to be good cattle country?

A. Yes, it is.

Judge Baum: That is all. You may examine.

Cross-Examination

By Mr. Albaugh:

Q. Does Mr. Ruud ordinarily use his ranch for pasture or for grain and hay, do you know?

A. What I noticed of it, he has been pasturing it quite a little.

Q. Now, this O V A on the left hip or the left ribs, whose brand is that?

A. Bruce Porter of Jackson, Wyoming.

Q. That is a Wyoming registered brand, I assume?

A. That is right.

Q. I believe you stated on your direct examination that these nine head weighed about 930 pounds?

A. Yes, that was my opinion, I didn't pay any attention to the weight; that is not my business.

Q. Exhibit number 3 shows these nine cattle weight to be 9335 pounds, do you remember that from the exhibit?

A. I didn't check it up.

Mr. Albaugh: Will you please show the exhibit to the witness, Mr. Bailiff.

(Testimony of J. J. Smith.)

Q. Now, Mr. Smith, I am trying to show whether these are the same nine cattle that are shown as weighing 9335 pounds are the ones you estimated would weigh nine hundred and thirty pounds?

A. Those are the same cattle.

Q. You estimated they would weigh 930 apiece.

A. Yes, sir, the same ones.

Q. One head weighed 1185 pounds, I think.

A. It shows that.

Q. Do you know who this draft for the nine head was paid to?

A. Do I know what?

Q. The payment for these nine head of cattle shown on the exhibit, do you know where the proceeds went?

A. Yes, sir,—well, I don't know where it went but I ordered the Livestock Company to clear the proceeds, that they could send it to Porter or Mr. Ruud. Mr. Ruud furnished a bill of sale and the check was in the name of Porter.

Q. How long did it take Max Ruud to get that Bill of Sale?

A. I didn't have anything to do with Max Ruud.

Q. Well, Mr. Ruud here.

A. I don't know,—I don't remember that.

Q. But you tied up the sale until he got the bill of sale from Porter, from Bruce Porter?

A. Yes, sir.

Q. And he got a new bill of sale?

A. Or found his old one, I don't know which.

(Testimony of J. J. Smith.)

Q. You don't know whether he got a new one or not? A. No, sir.

Q. Was there any brand O left hip on these cattle you saw?

A. No, sir, not on the nine head.

Q. Or any other cattle on Ruud's ranch?

A. No, sir.

Q. Did you ever see any cattle branded O left hip on his ranch at any time?

A. No, sir, I didn't.

Mr. Albaugh: That is all.

The Court: We will recess until 2 this afternoon.

2 o'Clock P.M., May 25, 1948

Judge Baum: I would like to ask the witness Smith a few more questions.

Mr. Albaugh: No objections from us.

The Court: Very well.

Q. Now, Mr. Smith, you are the same gentleman who testified [49] before lunch?

A. Yes, sir.

Q. After observing these nine head of cattle that you referred to in your testimony this morning, at the time you saw them in Idaho Falls,—did you afterward go over to Jackson?

A. Yes, sir.

Q. Did you there see a man named Bruce Porter? A. Yes, sir.

Q. Did you return to Idaho Falls after that?

A. Yes, sir.

Q. And upon your return did you see Mr. Ruud? A. Yes.

(Testimony of J. J. Smith.)

Q. Did you have another conversation with Ruud with reference to these nine head of cattle?

A. Yes, sir.

Q. State to the Court that conversation.

A. It seemed that the bill of sale of these cattle and the title as I remember, Mr. Ruud said that these cattle belonged to his son and they were not a part of the cattle that he had under contract to the American Pack.

Q. What else did he say in reference to the cattle under contract to the American Pack.

A. He said he had some on the ranch,—that they were back on the ranch or something of that kind. [50]

Q. This conversation occurred shortly after you held up the check on the nine head of cattle?

A. Yes, sir.

Judge Baum: That is all.

Mr. Albaugh: No further questions.

ORLAND ROBERTSON,

being called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Judge Baum:

Q. Where do you reside?

A. Jackson Hole, Wyoming.

Q. How long have you resided in Jackson Hole?

A. Twenty-three years.

Q. What business are you in?

A. Ranch work.

(Testimony of Orland Robertson.)

Q. Does that include the caring for cattle?

A. Yes, sir.

Q. Are you acquainted with Mr. Bert Ruud?

A. Yes.

Q. When did you first meet him?

A. Did you say where did I meet him or when did I meet him?

Q. When did you first meet him?

A. The latter part of October, 1946.

Q. Where? [51]

A. At the Wort Hotel.

Q. In Jackson?

A. Yes, in Jackson, Wyoming.

Q. Who was present at that time?

A. Mr. Ruud and myself.

Q. Did you have a conversation with Mr. Ruud at that time? A. Yes, sir.

Q. As a result of that conversation did you go to work for Mr. Ruud? A. Yes, sir.

Q. When did you start to work for him?

A. Around the 8th or 10th of November, 1946.

Q. What type of work were you doing?

A. Feeding steers.

Q. Feeding steers? A. Yes, sir.

Q. Where were you feeding these steers?

A. At the Elk Ranch, west of Moran, Wyoming.

Q. What was said and done at that conversation? A. Pardon me.

Q. What was that conversation, the conversation you had with Mr. Ruud?

A. At the hotel?

(Testimony of Orland Robertson.)

Q. Yes.

A. He wanted me to feed steers for the winter and we made [52] arrangements for when I came back from a trip to Idaho.

Q. You were going to make a trip to Idaho?

A. Yes.

Q. When you came back from the trip to Idaho did you have a further conversation with him?

A. Yes, sir.

Q. When was that?

A. The 8th or 10th of November.

Q. 1946? A. Yes, sir.

Q. What was that conversation?

A. He told me the amount of steers that was there because he had that contract to deliver next fall and he wanted to put gain on them, and he told me how they were marked.

Q. How did he say they were marked?

A. With green paint with an O on the left hip.

Q. How many head did he say he had?

A. 218 head.

Q. What else did he say?

A. I can't remember much else that was said.

Q. As a result of that conversation when did you start to work for him?

A. The last conversation?

Q. Yes. A. I fed that day. [53]

Q. Where was that last conversation?

A. The Elk Ranch.

Q. Did you find some cattle there that day?

A. Yes, sir.

(Testimony of Orland Robertson.)

Q. How many? A. 218 head.

Q. Did he say where he obtained those cattle?

A. Local people, Mrs. Grismer; Wayne Ricks and cattle from the Pinedale country.

Q. How were those cattle branded?

A. Fifty or sixty had the Bruce Porter brand O V A, and the Ricks brand Bar Dash Bar.

Q. What other brands did they have?

A. They had the green paint.

Q. Did Mr. Ruud tell you when that brand was put on them?

A. It had been put on just before he moved them to the Elk Ranch.

Q. Did he tell you where he was moving the cattle from? A. South of Jackson.

Q. Who did he say put the brand on?

A. He himself but I don't know who did.

Q. Did that brand appear fresh or was it an old brand? A. It was fresh.

Q. How many had the O V A on?

A. Sixty or seventy head.

Q. When you first observed these cattle,—strike that,— [54]

Q. You handled those for how long?

A. Twenty-eight or thirty days.

Q. During that period you observed them how often. A. Twice a day.

Q. You observed them twice a day during that period? A. Yes, sir, twice a day.

Q. What would you say they would weigh at that time? A. From 625 to 750 pounds.

(Testimony of Orland Robertson.)

Q. And were they good quality?

A. Good quality.

Q. And their approximate age?

A. Long yearlings.

Q. You worked there how long?

A. In November.

Q. When did you see the cattle last?

A. The latter part of December or the first of January.

Q. Have you an opinion as to what those cattle would weigh in the fall of 1947 if they were properly cared for on the ranch?

Mr. Albaugh: We object to that as incompetent, irrelevant and immaterial.

The Court: He may answer this question.

A. Yes, sir.

Q. State what that opinion is.

Mr. Albaugh: Now we object to this as the witness is not shown to be qualified. [55]

The Court: Objection sustained, let's hear more about this witness.

Q. For a few years ahead of this time you worked for Mr. Ruud, what had you been doing?

A. Working around ranches, feeding cattle.

Q. Did they raise cattle on those ranches where you worked?

A. Yes, sir.

Q. What other work did you do?

A. General farm work.

Q. Are you acquainted with the Irwin, Idaho, section of the country?

A. Just been through there.

(Testimony of Orland Robertson.)

Q. How far is that from Jackson Hole?

A. I don't rightly know.

Q. Approximately?

A. Fifty or sixty miles.

Q. What other work did you do prior to this work with Mr. Ruud? Did you ever weigh cattle?

A. Yes, I did.

Q. Where was that?

A. That was at Victor, Idaho, mostly. I was with the Mosley cattle; that was before I went to the service, I took small bunches out.

Q. Were you ever around the market when cattle were sold? A. Yes, sir. [56]

Q. And observed those cattle?

A. Yes, sir.

Q. And that covered a period of how many years? A. Ten years.

The Court: How old are you?

A. Twenty-three.

Q. Can you give an opinion as to those cattle,—what they would have weighed,—strike that, please,—can you give an opinion as to what those particular cattle that you fed in the fall of 1946, if they had been carried through the following summer in good ranch-like manner, would have weighed in the Fall of 1947?

Mr. Albaugh: Objected to as too general and no foundation laid. It is not shown that the witness is qualified to answer.

The Court: Overruled.

A. Yes.

(Testimony of Orland Robertson.)

Q. In August or September, 1947.

A. Approximately 925 to 1000 pounds.

Judge Baum: You may take the witness.

Cross-Examination

By Mr. Albaugh:

Q. When did you have that conversation in the Wort Hotel with Mr. Ruud? [57]

A. I don't remember the date. It was the latter part of October, 1946.

Q. Later part of October? A. Yes, sir.

Q. What time of the day was that?

A. That was at night.

Q. You were looking for a job?

A. I had a job. The fellow I was working for, the foreman of the Mosley outfit, knew Ruud needed a man and he was going to lend me to him for the winter.

Q. Moran is north of Jackson? A. Yes.

Q. About how far?

A. Thirty-three miles.

Q. These cattle were moved from south of Jackson to Moran? A. Yes, sir.

Q. How far would you say, forty or fifty miles?

A. Not over thirty-five.

Q. Some were moved from Pinedale?

A. They were trucked so far as I know.

Q. Did you help move the cattle?

A. No, sir.

Q. How long will paint show up on the cattle?

A. Not very long in a country with lots of storm.

(Testimony of Orland Robertson.)

Q. Three or four days? [58]

A. Oh, three or four months, it will show up three or four months.

Q. Isn't it true that on some cattle it will all be off in three or four days?

A. It will show up for that time.

Q. Paint is not used as a brand, is it?

A. That is the first I saw it.

Q. Have you known of it being used in moving cattle, to identify them from other cattle?

A. I never saw it used before.

Q. You say they were long yearlings, how old would they be, if you know?

A. Calves in the spring of 1945.

Q. Eighteen to twenty months old?

A. April or May calves and that was along in November that I saw them.

Q. You say that there were two hundred and eighteen head all together? A. Yes, sir.

Q. Did that include the sixty or seventy O. V. A. cattle? A. Yes.

Q. And did they have paint on them?

A. Yes.

Q. Did you make a record of the other brands?

A. I know those brands were there, with other ones but now [59] I can't remember them. I know the people's brand but right now I can't tell their brands.

Q. How big was this paint brand on those cattle?

A. The size of the bottom of a beer bottle.

(Testimony of Orland Robertson.)

Q. Isn't it a fact that the bottom of a beer bottle was dipped in the paint and dobbed on the cattle? A. That is what I was told.

Q. And it made more of a smudge than a brand?

A. More of an 'O'.

Q. It was more of a smudge than an O.

A. It was meant to be an O, you could see that.

Q. Was it on the left hip of all of them or some on the side?

A. So far as I remember it was all on the left hip.

Q. You didn't see that paint put on there with the beer bottle, did you? A. No, sir.

Q. You never ran the cattle down to Irwin, Idaho? A. No, sir.

Q. Now, what cattle would weigh would depend on the season, as to whether it is a wet or dry season.

A. The season we had last year——

Q. ——Just answer the question.

A. Yes, sir.

Q. And on how many cattle there was per acre, and how good the feed was? A. Yes. [60]

Q. Those cattle were kept in Jackson Hole all winter? A. Yes, sir.

Q. You fed them?

A. For twenty-eight to thirty days I fed them.

Q. How long did they stay in Jackson Hole?

A. They were taken out in the spring afterward, I don't know the date or the month, but it was after feeding was over.

(Testimony of Orland Robertson.)

Q. Probably about May, 1947?

A. Probably so.

Q. Did you help take them out?

A. No, sir.

Q. Now, isn't it a fact, Mr. Robertson, that in trailing those cattle from south of Jackson forty or fifty miles to Moran those cattle had to trail through other cattle with the same brand?

A. No, sir.

Q. Aren't there other cattle in Jackson Hole with the same brand?

A. Yes, but they would not have to trail through them.

Q. Why not?

A. Because the cattle with the same brand were in the fields at that time, the lanes were fenced where they moved the cattle.

Q. Isn't it true that in Jackson Hole there are cattle out [61] in the road at all times of the year?

A. Not at that time.

Q. In October?

A. Yes.

Q. None of them would be running loose anywhere in there?

A. Very little if anywhere.

Q. And if you didn't have a dob of paint on them they would get mixed up with other cattle with the same brand and you couldn't identify them?

Judge Baum: Objected to as argumentative.

(By the Court): He may answer.

A. I don't see how they could tell them.

(Testimony of Orland Robertson.)

Q. No, except for this daub of paint?

A. That's right.

Q. How many different brands would you say was on this 218 head of cattle?

A. I wouldn't say. I don't know.

Q. What is your estimate?

A. I wouldn't give an estimate.

Q. Was there more than one?

A. Other than the O V A you mean?

Q. Yes. A. Yes, there was.

Q. Would there be ten?

A. I wouldn't say. [62]

Q. Would there be five?

A. I know of three more besides the O V A that was local brands. Other than the cattle that came from Pinedale, but whether he bought them locally I don't know.

Q. You say you fed these for twenty-eight or thirty days? A. Yes, sir.

Q. And you don't know any more about the brands than you have just stated?

A. I don't know the number of them. I don't know any of the Pinedale brands. At that time I could remember what the local brands were, but I haven't worked around the local stock lately and I have forgot.

Q. Mr. Ruud volunteered this information that he had these cattle under contract?

A. He said he had them for delivery under contract and he wanted to put on as much gain as possible; he was telling me how to feed them.

(Testimony of Orland Robertson.)

Q. He wanted to put as much gain on as he could because he had them under contract?

A. I guess so.

Q. Did he say who he had them contracted to?

A. No, sir.

Q. What did you feed them? A. Hay.

Q. Any grain? [63] A. No, sir.

Q. Just plain hay? A. Yes.

Q. What kind of hay was that?

A. Mostly timothy and clover, a little wild hay in it.

Q. Did the cattle do pretty well on it?

A. Yes, sir.

Q. Are you getting paid for coming down here to testify? A. No, sir.

Q. Nothing whatever? A. No, sir.

Q. Are you getting your expenses paid?

A. I don't know, sir.

Q. Did you and Mr. Ruud ever have any trouble? A. Just arguments.

Q. You testified in this case the last time, did you not? A. Yes, I was on the stand.

Q. Now, this argument that you had, what do you mean by that; how serious was that?

A. It wasn't so serious.

Q. Did he fire you or discharge you from his employ?

A. No, sir; he sent a man to take my place and I went back where I was.

Q. Did he fire you? [64]

A. He told me this fellow I was working for

(Testimony of Orland Robertson.)

needed me back and he sent this man up to replace me.

Q. Mr. Ruud told you that your former employer needed you?

A. Well, he never told me personally, he wrote a letter to me and sent it with the man.

Q. And did that arouse resentment in you against Mr. Ruud?

A. I didn't care for his way of doing business.

Q. Isn't it a fact that Mr. Ruud didn't at any time mention any contract on these cattle, to you?

A. Isn't it a fact, you say?

Q. Isn't it a fact that he didn't, at any time, mention any contract in connection with the cattle, to you?

A. He did mention it, he didn't mention who it was to but he did mention it, he didn't say who it was or anything like that, but he said he had that contract and he wanted to put on as much gain as possible.

Q. Your feelings against Mr. Ruud would not influence your testimony here any, would it, Mr. Robertson?

A. No, sir.

Q. You are living in Jackson Hole now?

A. That's right.

Q. Isn't it a fact that there was a very decided variation in the weights of those cattle you fed there at Moran for Mr. Ruud?

A. I didn't get that. [65]

Q. I say, wasn't there a decided variation in the weights of those cattle you fed for Mr. Ruud? Was there some of them light, some heavy, and some of them two-year-olds?

A. Not so much.

(Testimony of Orland Robertson.)

Q. There was a variation in the weight?

A. Yes, but not so much. Not so much difference, I didn't state that to be the correct weight, it is approximate.

Q. Isn't it a mixed bunch of steers?

A. That's right, it was a mixed bunch.

Q. They were not all yearlings?

A. The biggest majority was long yearlings.

Q. Some people call them two's.

A. Over in our country we call them long yearlings.

Q. Some of them would weigh as much as two to three hundred pounds more than others?

A. I wouldn't know, I never saw them weighed.

Q. You saw the cattle? A. Yes, sir.

Q. You have had experience and know how much cattle will grow and how much steers weigh, when you look at them? A. Approximately.

Q. Isn't it a fact that those cattle varied as much as two to three hundred pounds from the large to the small?

A. They would not vary that much, I don't think.

Q. Well, how much would the variance be? [66]

A. Maybe a hundred to a hundred and fifty pounds.

Q. From the largest to the smallest?

A. Somewhere in there.

Q. You saw them every day for thirty days or more?

A. Twenty-eight to thirty days, I doubt if it was that long.

(Testimony of Orland Robertson.)

Q. When they were sold it would be your judgment that they would vary about the same in weight, or would that variation be more or less in August, 1947?

A. I never saw the steers again. I couldn't tell.

Q. If the greatest variation was a hundred and fifty pounds in weight, how would you say that variation would be in August 1947?

A. Approximately the same.

Q. If some of them weighed 1250 pounds in August, 1947, and some of them weighed 850 pounds would you say it could be the same bunch of cattle?

A. I don't imagine it would be but I don't know.

Q. Were those all White Faces?

A. Most of them white-faced, some of them brockle-faced.

Q. Now, that conversation in the Wort Hotel that night, will you relate that again to us?

A. In the Wort Hotel?

Q. Yes, with Mr. Ruud.

A. That was the night I went to see him and make a deal to go to work. My foreman said he would leave it to the two of us to decide. I told this other boy I would go. [67] There was two of us and the foreman says he would leave it to the two of us to decide, and I told him I would go up and go to work for him, and I went in to the hotel and saw him and we made the deal on that night.

Q. What did you say and what did he say to you?

(Testimony of Orland Robertson.)

A. We talked about going to work and about steers,—I don't remember the words.

Q. You don't remember what he said and what you said?

A. I told him I was coming to Idaho for a week or ten days and when I came back I would go to work.

Q. About the only definite part of that conversation you remember is that he told you he had these cattle under contract?

Judge Baum: We object to that as not proper cross-examination. The conversation as to the cattle being under contract was not in the hotel.

A. No, that was the day I went to work.

Q. The conversation in the Wort Hotel, can you give that?

A. That is the one I told you; that is the one where I talked about going to work for him.

Q. Where did this other conversation take place?

A. At the Elk Ranch.

Q. What day was that, approximately?

A. That was approximately the 8th or 10th of November.

Q. The 8th or 10th of November? [68]

A. Yes; that was after I came back from Idaho.

Q. Had you been working for Ruud at that time? A. No, not at that time.

Q. When did you start to work for him?

A. The 8th or 10th of November.

Q. What time of the day was this? —

A. In the afternoon.

(Testimony of Orland Robertson.)

Q. At the ranch? A. Yes, the Elk Ranch.

Q. And where at the ranch?

A. Ten miles east of Moran.

Q. Will you relate that conversation?

A. He told me the number of cattle and how they were marked.

Q. Well, what did he say?

A. He said there was 218 head and they were marked with green paint on the left hip and that he wanted all the gain he could put on them because he had them under contract to be delivered next Fall.

Q. And what did you say?

A. There wasn't much I could say.

Q. What did you say?

A. I don't remember what I did say.

Q. You don't remember what you said?

A. We talked about the cattle, back and forth.

Q. Was this good quality hay that you were feeding? [69]

A. The hay Mr. Ruud had was pretty fair hay.

Q. Isn't it a fact that those cattle came out the next Spring weighing less than they did in the Fall, if you know?

Judge Baum: Objected to, this witness has said that he didn't see them since November.

The Court: He may answer. Counsel asked if he knows.

Q. Do you know? A. No, sir, I don't.

Mr. Albaugh: That is all.

Judge Baum: That is all.

O. T. BLAINE,
called as a witness for the plaintiff, after being first
duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. You reside at Idaho Falls?

A. Yes, sir.

Q. And your business or employment?

A. Office manager for the Idaho Livestock Auction Company.

Q. Were you so employed in the Fall of 1947?

A. Yes, I was.

Q. That included the months of August, September and October of that year?

A. Yes, sir. [70]

Q. Who has control of the books of that corporation?
A. I do.

Q. Did you have control of them in August, 1947?
A. Yes, sir.

Q. And September and October, 1947?

A. Yes, sir.

Q. Look at exhibit number 5 and state what it is?

A. Account Sales for 149 cattle sold by Mr. Ruud at Idaho Falls, September 10, 1947.

Q. What does it show?

A. The number of cattle, description of the cattle, the price per hundred weight, the weight; the purchaser; the amount of money and the amount of the checks issued.

(Testimony of O. T. Blaine.)

Q. Is there attached to each exhibit, a check?

A. There is.

Q. Now, exhibit number 6, what is that?

A. That is the same thing on September 17.

Q. How many head does exhibit 5 show?

A. 149 head.

The Court: And the other one?

A. 26 head.

Q. On exhibit 6, that shows twenty-six head.

A. Yes, twenty-six steers.

Q. Are those records of your office? The ones you have there?

A. Yes, sir. [71]

Q. And checks issued by your office?

A. Yes, sir.

Judge Baum: That is all of this witness at this time?

Mr. Albaugh: You are recalling him?

Judge Baum: If not, you may call him for cross-examination, we will have no objection.

Mr. Albaugh: That is agreeable with us, if it is satisfactory to the Court.

The Court: Yes, you may do that.

RAY SKELTON,

called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. State your name. A. Ray Skelton.

Q. Where do you reside, Mr. Skelton?

A. Idaho Falls, Idaho.

Q. What business are you engaged in?

(Testimony of Ray Skelton.)

A. Livestock Commission business.

Q. With what concern?

A. Livestock Auction Company.

Q. Were you so engaged in October, September and August of 1947? A. Yes, sir. [72]

Q. Will you look at exhibit 5 and state, if you know, what that is? A. Yes, sir.

Q. What is it? A. Account of sale.

Q. What company or institution?

A. Idaho Livestock Auction Company.

Q. That exhibit is an account of sale of the Idaho Livestock Auction Company of Idaho Falls?

A. Yes, sir.

Q. Thereon is a memorandum listed on there as to the purchaser of the cattle, is it "J D"?

A. That is ILSA R 6, that is an order of mine that I bought on that day.

Q. That is an order of yours? A. Yes, sir.

Q. Is there any other information on that exhibit that indicates that the cattle were bought on a direct order of yours?

A. ILSA R 6, yes.

Q. That is the top one? A. Yes.

Q. How many head of cattle on that order?

A. One on that order. [73]

Q. Now, the next order you issued?

A. Another one, that is below that eight head, it is the seventh line.

Q. What does it indicate?

A. It is indicated the same way ILSA R 6.

Q. How many head of cattle on that order?

A. One.

(Testimony of Ray Skelton.)

Q. Go on down through the exhibit.

A. Two steers on down.

Q. How is that indicated?

A. The same way ILSA R 6.

Q. How many more are there?

A. One at a time for two lines below that.

Q. What is the next one?

A. Fifty head at the bottom.

Q. Fifty head?

A. Fifty steers that is indicated R 50 ILSA,
at \$26.15 and one at \$23.15.

Q. One at \$26.50? A. That's right.

Q. And one at \$23.50, you said?

A. \$23.15.

Mr. Albaugh: It seems to me the document is
the best evidence of what it contains.

Judge Baum: Very well. [74]

Q. You are referring to what exhibit, Mr. Skel-
ton? A. Exhibit 5.

The Court: Are these the same exhibits the for-
mer witness identified?

Judge Baum: Yes, Your Honor, they are.

Q. What exhibit did you have there?

A. Exhibit 5.

Q. Did you in giving these orders see the cattle
yourself? A. Yes, sir.

Q. You saw the type of cattle they were?

A. Yes, sir, and I would call them real good
cattle.

Q. Good quality? A. Yes, sir.

Q. Steers? A. Yes, sir.

(Testimony of Ray Skelton.)

Q. Now the next exhibit, does that refer to any matter you have presented here?

A. Eighteen steers was an order of mine, it is designated ILSA ED.

Q. You saw those steers, did you?

A. Yes, they were very good, too.

Q. Is there any other notation you recognize, any other cattle that you gave orders to buy?

A. No, sir.

Judge Baum: At this time we offer in evidence [75] exhibits 5 and 6.

Mr. Albaugh: We object to the introduction of exhibits 5 and 6. They have failed to connect them with this contract, or the cattle described as the subject matter in issue. It is an attempt to vary or modify the terms of the written contract by parol testimony without any pleadings upon which to base such testimony or such a modification of the contract. These could be any cattle. It is incompetent, irrelevant and immaterial and cannot prove or tend to prove any issue in this case.

The Court: There may be a difference of opinion about that. The objection is overruled.

(Testimony of Ray Shelton.)

PLAINTIFF'S EXHIBIT No. 5

Idaho Livestock Auction Co.

(A Market Agency)

149

Idaho Falls, Idaho 9/10/47

Sold for Account and Risk of: Bert Rudd, P. O. Alpine.

Cattle	Price	Weight	Purchaser	Amount	Total
1 str.	24.50	950	Ilsa R 6	232.75	
25 str.	26.10	26590	Poulsen 25	6,939.99	
25 str.	26.35	29515	Ilsa 12	7,777.20	
27 str.	25.75	25025	Ilsa 27	6,443.93	
8 str.	25.50	7720	Poulsen	1,968.60	
1 str.	23.40	1210	Isla R 6	283.14	
1 str.	24.35	1040	Poulsen	253.24	
1 str.	23.80	1140	Ilsa 9	271.32	
1 str.	24.00	845	Poulsen	202.80	Hold Brand
1 str.	25.00	990	Isla 9	247.50	
1 str.	23.70	935	Arthur	221.59	
1 str.	23.90	955	Poulsen	228.24	
1 str.	24.00	925	Poulsen	222.00	
2 str.	23.70	1950	Ilsa R 6	462.15	
1 str.	24.40	1010	Ilsa R 6	246.44	
1 str.	23.10	1165	Ilsa R 6	269.11	
1 str.	22.90	1165	Poulsen	266.78	
50 str.	26.15)				
1 hd off	23.15)	51365	R 50 Ilsa	13,401.13	\$39,937.91

149

154495

Truck or Freight, including charges on road....	145.00	
Feed	67.05	
Commission	260.75	
Brand Inspection	14.90	487.70

Net Proceeds.....	\$39,450.21
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Wyoming Stock Growers 1 ck hold.....	\$ 199.50
1 ck. O.K.	\$39,250.71

Check to Hold

(Testimony of Ray Shelton.)

[Idaho Livestock Auction Co. Billhead]

a/c Bert Ruud

[In red]: Do Not Count

Idaho Falls, Idaho, 9/11/47

Sold for Account and Risk of: Wyoming Stock Growers Assoc.

P.O. Cheyenne, Wyo.

Cattle	Price	Weight	Purchaser	Amount	Total
1 str.	24.00	845	Poulsen	202.80	
				<hr/>	\$202.80
Truck or Freight, including charges on road.....	\$ 1.45				
Commission	1.75				
Brand Inspection10				3.30
				<hr/>	
Net Proceeds.....					\$199.50

PLAINTIFF'S EXHIBIT No. 6

[Idaho Livestock Auction Co. Statement]

26 ctl

Idaho Falls, Idaho, 9/17/47

Sold for Account and Risk of: Bert Rudd, P.O. Irvin.

Cattle	Price	Weight	Purchaser	Amount	Total
18 str.	25.20	18880	Ilsa Ed	4,757.76	
1 str.	23.00	945	Morris	217.35	Hold for Wyo
7 str.	26.00	9000	Ilsa 11	2,340.00	
				<hr/>	\$7,315.11

26

Truck of Freight, including charges on road....	\$ 27.00	
Feed	23.40	
Commission	45.50	
Brand Inspection	2.60	98.50
	<hr/>	
Net Proceeds.....		\$7,216.61

Pay to the order of J. T. Rudd.—Bert Rudd.

J. T. Rudd—Hold 1 ck.	\$ 213.35
O.K.	7,003.26

Judge Baum: You may take the witness.

(Testimony of Ray Shelton.)

Cross-Examination

By Mr. Barnard:

Q. Did you notice any brand on those cattle?

A. No, sir.

Q. You don't know what brand might have been on them? A. No, sir.

Q. There is nothing on exhibits five and six to indicate the brand that was on those cattle?

A. No, sir.

Mr. Barnard: That's all.

Judge Baum: Nothing further. [76]

J. J. SMITH,

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. Will you look at these exhibits which the Bailiff handed you and then I will ask you a question concerning them? A. Yes, sir.

Q. Now, Mr. Smith, have you looked those over?

A. Yes, sir.

Q. Did you, in your capacity at Brand Inspector, make any record of the brand those cattle bore at the time of the sale? A. Yes, sir.

Q. Have you those records?

A. Yes, sir.

Q. Can you take the first exhibit, which is exhibit 3 and state to the Court the Brands those cattle bore?

A. Yes, sir, they had O V A monogram, connected together on the left ribs.

(Testimony of J. J. Smith.)

Q. The entire nine of them? A. Yes, sir.

Q. Now, take exhibit 5,—withdraw that, please,—do you know whose brand the O V A is. Who owns that brand?

A. Bruce Porter, Jackson, Wyoming. [77]

Q. Now, take exhibit 5. State to the Court all the cattle that had any brand and give the brand?

A. Could I give the brands,—I have these two exhibits with the brands listed together.

Q. Well, take the two exhibits then.

A. They was,—do you want the number of each brand?

Q. Take the exhibits and the number of cattle sold on October,—no, on September 10, give, if you know, the brands, and the number of each brand.

Q. Nineteen cattle, with upside down U on the left shoulder and upside down U on left ribs and left hip.

Q. Whose brand is that?

A. Mrs. Ora Grismer.

Q. Go ahead.

A. Fifteen and twenty-nine were branded X A with Bar Cross on the lower part of it.

Q. What brand is that?

A. That is the Ball brand.

Q. Who was the owner?

A. Ball,—Delbert Ball.

Q. Where does Delbert Ball reside?

A. Pinedale.

Q. Go ahead.

A. Ten and twenty-one with O V A on them.

(Testimony of J. J. Smith.)

Q. And whose brand is that? [78]

A. Bruce Porter.

Q. You said he was from Jackson, Wyoming?

A. Yes, sir.

Q. Now, go ahead.

A. I have got sixteen steers with Diamond over mill iron on the right hip.

Q. Whose brand is that?

A. That is Robinson's brand.

Q. Is that George Robinson? A. Yes.

Q. Where does he live?

A. In Jackson Hole, down the Hoback.

Q. Go ahead.

A. Sixteen steers with Upside down U Bar N on the left hip.

Q. Do you know whose brand that is?

A. That is Robinson's,—George Robinson's brand and the other one, the Diamond and Mill Iron brand, is the Ricks brand. I don't have them listed and I was mixed up on that.

Q. Go ahead.

A. There was twenty-one of those Ricks cattle instead of 16, if I said 16 before.

Q. And how many does that give you of the Robinson cattle? A. Sixteen.

Q. Any of Frank Jensen's cattle? [79]

A. Yes, sir.

Q. How many? A. Four head.

Q. To shorten this up, Mr. Smith, do you have on exhibit five, any of Frank Jensen's brand M6 on the left hip? A. Yes, I have.

(Testimony of J. J. Smith.)

Q. Refer to your list and these exhibits you have and tell us how many of those cattle on the exhibits are branded M6 on the left hip?

A. Four of the M6 branded cattle on the exhibits.

Q. Who does that brand belong to?

A. Frank Jensen.

Q. Where does he live?

A. Out around Daniels, close to Daniels.

Q. Where was Wayne Ricks residing?

A. At Jackson,—he gets his mail at Jackson.

Q. Have you any record of the other cattle?

A. Yes, sir.

Q. What is the brand and by whom is it owned?

A. On these exhibits, you mean?

Q. Yes.

A. I would like to get another record I have here.

The Court: This is all very confusing to the Court.

Q. Now, have you the remaining part of your records you mentioned? [80] A. Yes.

Q. Take these exhibits and, if you can, give us the number of steers on each exhibit and what brand they bore. The ones shown as sold for Bert Ruud. I think you gave us the nine sold in August. A. Yes, sir.

Q. They bore the O.V.A. brand?

A. Yes, sir.

Q. Now, go to the sale of September 10 and September 17.

(Testimony of J. J. Smith.)

A. Twenty-six steers with U on left shoulder and upside down U on left ribs and straight U on left hip. Twenty-six of those.

Q. Whose brand is this?

A. Ora Grismer.

Q. Ora Grismer resides where?

A. Jackson. Forty-four cattle with Cross A brand, they were steers.

Q. Where was that brand placed on the steer?

A. Left ribs.

Q. Whose brand is that?

A. Delbert Ball.

Q. He resides where? A. Pinedale.

The Court: This witness is having some difficulty in checking these. We will recess for fifteen [81] minutes.

3:15 P.M., May 25, 1948

Q. Now, Mr. Smith, refer to exhibit 3 and tell us if you can what the brands were on those cattle. Can you give us the brands on those cattle listed in exhibit 3? A. Yes, sir.

Q. What brand did they bear?

A. O V A on left ribs.

Q. That was the brand of Bruce Porter, of Jackson, Wyoming? A. Yes, sir.

Q. Now, on exhibit five, give us the brands on the cattle listed there, the number of the cattle and the owner of the brand.

A. Exhibit 5?

Q. Yes, exhibit five.

A. There is eight steers with O V A brand on left ribs.

(Testimony of J. J. Smith.)

Q. That was the Bruce Porter brand?

A. Yes, sir.

Q. Go ahead.

A. Five steers with the Upside down U on left shoulder and on the ribs and the straight U on the left hip.

Q. Whose brand is that?

A. Ora Grismer.

Q. And the next.

A. One steer with,—well, it is more like a Cock-eye that is [82] recorded to Billy Byers.

Q. Where does he reside? A. Pinedale.

Q. The next.

A. Six head with the Cross A on the left ribs.

Q. Whose brand is that?

A. That is Delbert Ball's brand.

Q. He resides at Pinedale also, you said?

A. Yes, sir.

Q. Go ahead.

A. Two steers with Upside down U and Bar N on the left hip.

Q. Whose brand is that?

A. That is Wayne Ricks brand.

Q. He resides in Jackson, Wyoming?

A. Yes, sir.

Q. Go ahead.

A. Three steers with Diamond over Mill iron on the left ribs.

Q. Whose brand is that?

A. George Robinson,—I was a little mixed on these brands before, when I testified to them.

(Testimony of J. J. Smith.)

Q. Where does he live?

A. Jackson Hole, on the Hoback.

Q. Go ahead with the next.

A. One steer with M6 brand.

Q. Whose is that? [83]

A. Frank Jensen's.

Q. Where does he live? A. Daniels.

Q. Is that all the cattle shown on exhibit 5?

A. Yes, it is.

Q. Now, take the next exhibit. Exhibit 6.

A. Exhibit 6, there are twenty-five steers with upside U on left shoulder and ribs and straight U on left hip.

Q. Whose brand is that?

A. Mrs. Grismer's.

Q. Mr. Smith, I think we referred to the exhibit with the twenty-six head of cattle listed on it, as exhibit 5 and you gave the brands and the owners of the brands; that should have been indicated as exhibit 6 and we are now starting on exhibit 5. A. Yes.

Q. Now, go ahead.

A. The twenty-five steers with upside down U on left shoulder and ribs and straight U on left hip, that was Mrs. Grismer's brand.

Q. The next one.

A. Forty-four with Cross A.

Q. Is that the same Cross A brand you referred to before? A. Yes, sir.

Q. And owned by the same person? [84]

A. Yes, sir.

(Testimony of J. J. Smith.)

Q. All right.

A. Thirty-four with the Bruce Porter brand; twenty-four with the Diamond Over Mill Iron brand,—that is the George Robinson brand.

Q. Those are the same men you referred to before? A. Yes, sir.

Q. Go ahead.

A. One with M over the hanging 6.

A. Is that the brand you referred to as belonging to Mr. Frank Jensen? A. Yes, sir.

Q. Wait a minute, we are crossed up here. Could I repeat this exhibit?

Q. Yes.

A. All right. Twenty-five with the Grismer brand; forty-four with the Cross A brand; thirty-one with the O V A brand; twenty-one with the diamond over mill iron brand, that as I told you, is the George Robinson brand, and sixteen with the upside U Bar N brand.

Q. And that is whose brand?

A. That is the brand of Wayne Ricks. Three steers with quarter circle L Bar.

Q. Whose is that?

A. E. C. Todd's. [85]

Q. Where does he live? A. Pinedale.

Q. Go ahead with the next?

A. Four steers with the M hanging 6 brand, that is the Frank Jensen brand, and there was one with W F brand, the F upside down and connected.

Q. Did you have four with E G brand?

(Testimony of J. J. Smith.)

A. Yes, sir.

Q. Whose brand is that?

A. That is Mr. Calton's.

Q. And where does Calton live?

A. In the Daniel country.

Q. You have given all the brands on the cattle in those three exhibits, now?

A. Yes, sir.

Q. Have you in your possession the brands on some cattle that Mr. Bert Ruud shipped to Denver, Colorado?

A. Yes, sir.

Q. How many head were there?

A. Thirty-one head.

Q. Can you give us those?

A. Yes, sir. Thirty-one steers branded O V A left ribs.

Q. Whose was that?

A. That is the Bruce Porter brand. They were loaded at Cokeville and arrived at Denver on August 22, 1947. [86]

Q. Does your record show the bringing of certain cattle by Mr. Ruud from Jackson to Idaho in the Spring of 1947?

The Court: Those to Denver, are they in addition to the steers you have been talking about?

Judge Baum: Those are not the ones the witness has testified about.

Q. Have you a record of the number of cattle Mr. Ruud brought from Jackson Hole to Idaho in the Spring of 1947?

A. Yes, sir.

Q. Now, the number of those?

A. 218 head.

(Testimony of J. J. Smith.)

Q. 218 head brought to Idaho.

A. Yes, he told me that he brought them from the Elk Ranch in Jackson Hole, Wyoming, to Irwin, Idaho.

Q. Can you give us the brands, the number of different brands? A. Yes, sir.

Q. Do so.

A. Twenty-eight branded Upside down U on the left shoulder and left ribs and U on the left hip, that was Mrs. Ora Grismer's brand. Seventy-eight steers with the O V A brand; this was the Bruce Porter brand. Fifty-three steers with the Cross A brand on, that was the Delbert Ball brand.

Q. That brand was where on the cattle?

A. The left ribs. [87]

Q. Go ahead, or had you finished?

A. No. There was twenty steers that were branded with the Upside down U Bar N on the left hip; that was Wayne Ricks' brand. He had nine branded M hanging 6—no, that is wrong—nine steers with quarter circle L Bar; that is the E. C. Todd brand. Five steers with M hanging 6 brand on the left hip that is Frank Jensen's brand and twenty-five Diamond over Mill Iron, that is George Robinson's brand. And I think that is 218 head.

Q. Have you the date they were brought from Jackson into Idaho?

A. Yes, I have. They were inspected out of Teton County on May 9, 1947.

Judge Baum: Take the witness.

(Testimony of J. J. Smith.)

Cross-Examination

By Mr. Albaugh:

Q. Mr. Smith, when you were on the stand a while ago you mentioned a conversation you had with Bert Ruud concerning Bruce Porter and the nine head of cattle? A. Yes, sir.

Q. Where did that conversation take place?

A. I think it was in my office or around there close.

Q. About what time of the year was that, as close as you can fix it?

A. It was some time after these cattle were shipped to the [88] market.

Q. You are acquainted with Mr. Salerno of the plaintiff corporation? A. Yes, sir.

Q. He had been up to see you some time before you had this conversation with Mr. Ruud?

A. I don't recall that; I saw Mr. Salerno there every sale pretty near. I don't recall any conversation until pretty late in the year with Mr. Salerno.

Q. Before you had this conversation did Mr. Salerno claim that he had some cattle under contract with Mr. Ruud?

A. Yes, he told me he had some but I wouldn't say the specific time he said.

Q. Wasn't that the occasion for this conversation about the contract on the Bruce Porter Cattle. You made some inquiry whether these cattle were under contract?

(Testimony of J. J. Smith.)

A. No, I don't think I did. I don't ask shippers their business, no more than getting the title of the cattle I am interested in.

Q. What was the occasion for the conversation about the cattle being under contract if you didn't inquire?

A. Mr. Ruud gave me the information when I was trying to clear this deal up.

Q. Did he tell you Mr. Salerno claimed he had some cattle under contract? [89]

A. Yes, sir, he said he had them and that there might be some complications either way. I understand that was because he had the cattle under contract to the American Packing Company.

Q. Did he tell you there was a controversy over the matter at that time?

A. I don't know that he went into detail at that time.

Q. Did he use the word complications?

A. I wouldn't be sure about that, but he said these cattle had nothing to do—I understood that the cattle, the nine cattle had nothing to do with the cattle he had under contract; how that came about I don't remember, I have thought of many things since that time.

Q. You knew there was a controversy around the stockyards; it was generally discussed that there was some dispute between Mr. Ruud and the American Packing and Provision Company?

A. Yes, sir.

Q. You heard that from several places?

(Testimony of J. J. Smith.)

A. Mr. Porter told me he had sold these cattle to Mr. Ruud and Mr. Ruud in turn sold them to the American Packing Company.

Mr. Albaugh: I move that answer be stricken as not responsive.

The Court: What Mr. Porter said may go out.

Q. When you had this conversation with Mr. Ruud about the nine head, you knew about this controversy or complication between the American Packing and Provision Company and Mr. Ruud?

A. No, I didn't, because I thought if there was any that Mr. Ruud would turn the cattle over. I don't know that I knew there was any trouble between the American Packing Company and Mr. Ruud.

Q. You knew there was a complication?

A. I imagined there was from what Mr. Porter said when he wouldn't claim the cattle.

Mr. Albaugh: I move that answer be stricken as not responsive.

The Court: The answer may stand.

Q. You knew that Mr. Salerno, as the buyer was claiming these nine head of cattle, didn't you?

Judge Baum: At that time.

Q. When this conversation took place?

A. I don't know that I did. I would like to explain something more.

Q. Just answer the question, Mr. Smith.

A. Yes, I think I did.

Q. How did you know that?

A. I think that Mr. Salerno purchased the cattle that day, the nine head of cattle. [91]

(Testimony of J. J. Smith.)

Q. That Mr. Salerno was claiming the cattle, the nine head?

A. You hear things that you don't jot down.

Q. You knew it, but you don't remember how you learned it, is that right, Mr. Smith?

A. That is about it.

Q. Mr. Ruud told you that the Bruce Porter cattle were not under contract? A. That is right.

Q. And that is about the substance of the conversation, isn't it?

A. Any more than just pertaining to the bill of sale, yes, and to the title of the cattle.

Q. Those cattle concerning which you have been testifying as to the brands, and referring to exhibits five and six, were they the same cattle you saw on Mr. Ruud's ranch at Irwin, Idaho?

A. Yes, I presume they were.

Q. You examined the cattle enough to identify them with these sales accounts? A. Yes, sir.

Q. That is, the cattle on his ranch?

A. Yes, sir.

Q. Tell us about when you saw them on the ranch?

A. It was in May,—some time in May or shortly after because [92] the Sheriff at Jackson called me to go and see where they were, and to look at the cattle.

Q. You went to look at them?

A. To see if they went out of the State of Wyoming into Idaho.

(Testimony of J. J. Smith.)

Q. They checked up all right with the cattle that had come out of Jackson Hole into Swan Valley to the best of my ability to check them.

Q. Did you see them after May, 1947?

A. I saw them a time or two as I drove past on the road.

Q. When did you see them last before they were taken to Idaho Falls?

A. Well, I don't know. I looked them over,—no, I don't know after I went to look at them for the Sheriff I didn't pay no attention.

Q. You saw them twice, you say, between May and the first of September?

A. I saw cattle there and they looked like the same cattle.

Mr. Albaugh: That's all.

Judge Baum: That is all, thank you.

GARTH B. PECK,

called as a witness by the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Olmstead:

Q. Do I understand that it is [93] stipulated that exhibit 7 is a letter written by Mr. Fallentine of the American Packing and Provision Company to Mr. Ruud and received by Mr. Ruud?

Mr. Albaugh: We have no objection to that stipulation.

Mr. Olmstead: Then I will offer that exhibit in evidence.

The Court: If there is no objection it is admitted.

(Testimony of Garth B. Peck.)

PLAINTIFF'S EXHIBIT No. 7

[American Packing & Provision Co.]

August 26, 1947.

Registered Return Receipt Requested

Mr. Bert Ruud

Irwin

Idaho

Dear Sir:

Your letter of August 22, 1947, addressed to this Company concerning delivery of cattle contracted for between this Company and you under date of November 4, 1946, has been received. Our interpretation of the letter is that you are now seeking to avoid your contract which called for delivery to this Company of 300 steers as called for by this Company between August 1, 1947, and October 1, 1947. If you will refer to your copy of the Contract, you will observe that there was an unconditional agreement upon your part to deliver to this Company 300 head of steers, as described in the contract, and we are aware of no valid reason why you should not fulfill as you agreed. It is true, of course, that the price has gone up since the date of the contract, but we are not unmindful of the fact that if the reverse had been true and the price had gone down, this Company would have been obligated to pay the contract price, and we have no doubt but that you would have insisted upon a strict compliance by us.

(Testimony of Garth B. Peck.)

Paragraph 4 of the contract calls for delivery by you of the steers to this Company, f. o. b., Ogden, Utah, as called for by this Company between August 1, 1947, and October 1, 1947, and demand is accordingly herewith made upon you for delivery of such steers immediately. In the event the same are not received by next Wednesday, September 3, 1947, the matter will be referred to our attorneys for appropriate action against you for breach of your agreement to deliver as set out in the contract.

Very truly yours,

AMERICAN PACKING &
PROVISION CO.,

By /s/ E. W. FALLENTINE,

Vice-President.

Q. Now, will you state your name?

A. Garth Peck.

Q. Where do you reside? A. Ogden.

Q. Ogden, Utah? A. Yes.

Q. What is your business?

A. Peck Brothers Livestock Commission.

Q. Where is that located?

A. At the Union stockyards.

Q. At Ogden? A. Yes, sir.

Q. How long have you been associated with that concern?

A. I have been there since I was five years old, but I have been associated since 1941.

Q. You have been associated and interested in the Company for seven years? [94]

A. Yes, sir, except while I was in the service.

(Testimony of Garth B. Peck.)

Q. What is that business?

A. We sell them to the highest bidder.

Q. It is a livestock business, you buy and sell?

A. We have them consigned,—people consign their cattle to us and we sell them to the highest bidder.

Q. How many cattle do you handle?

A. I think for 1947 it was between forty-seven and fifty thousand head.

Q. That was for 1947? A. Yes, sir.

Q. From your experience in the operation of that business can you state whether or not in August and September, 1947, there was a market for good quality steers at Ogden, Utah?

Mr. Albaugh: That is objected to, there is nothing in the contract that requires the steers to be of good quality. It is incompetent, irrelevant and immaterial.

The Court: That question can be answered yes or no.

Q. State whether there was a market or not?

A. Yes, there was a market there.

Q. Now, from your experience in the operation of that business [95] and with the market during August and September, 1947, can you state what the market value of good quality live steers was at Ogden, Utah?

Mr. Albaugh: We make the same objection that it is not the proper way to prove this, it is incompetent, irrelevant and immaterial. There is nothing in the contract that requires the steers to be of good quality, or of any other quality.

(Testimony of Garth B. Peck.)

The Court: The objection is overruled with the observation that this is a matter subject to further examination.

A. That would depend on whether you mean slaughter steers or feeders.

Q. Give us both.

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial.

The Court: The same ruling.

A. Well, on slaughter steers they would have brought, let's see, those figures would be twenty-two to twenty-three cents, and slaughter steers from 25 to 26.

Q. Was that generally true through August and September?

A. August was perhaps slightly lower than September and toward the end of September they kept going higher.

Mr. Olmstead: That is all, you may examine.

Cross-Examination

By Mr. Albaugh: [96]

Q. What would common steers be worth?

A. That again brings the question of killer and feeder.

Q. Published in the reports as common steers?

A. 16, 17½, or 18, along in there.

Q. And there are many different grades of steers.

A. Yes, sir.

Q. There are what they call canners?

A. There are very few that are sold for canners unless there was something wrong, something physically wrong.

(Testimony of Garth B. Peck.)

Q. These slaughter steers at 25 to 26 cents would they have been off grass or would they have been grain fed.

A. The majority would have been off grass. At that time there would be very few grain fed steers coming in.

Q. And that price would vary with the grade of slaughter steers?

A. That was for good grade slaughter steers.

Q. That would be about the top grass fed slaughter steers? A. Yes, sir.

Q. Then they would run down in the various grades, down to the price you gave for common steers? A. That is correct.

Mr. Albaugh: That is all.

Redirect Examination

By Mr. Olmstead:

Q. Mr. Peck, would you say that steers purchased in the [97] fall of 1946 and fed until in the late Summer of 1947 with the price to be paid for them following the slaughter of the steers,—would you say they could normally be other than slaughter steers?

Mr. Albaugh: That is objected to as incompetent, irrelevant and immaterial, and the witness is not shown to be qualified.

The Court: The question is argumentative, the objection will be sustained.

Q. Mr. Peck, when you refer to common steers were you referring to slaughter or feeders?

(Testimony of Garth B. Peck.)

A. When you get down to common grade, they are usually mixed breed, common Jersey and common Holstein, they could be slaughter steers.

Q. When you refer to the 16 and 17 cent price were you referring to feeder or slaughter steers?

A. Slaughter steers.

Q. And what grade?

A. That would be, I imagine U S grade,——

Q. Let me ask this, what quality?

A. Common steers.

Q. Does that include White Faces?

A. No, very few of them would go to the packers unless they were sick or cripples or had lump-jaw or something like that. [98]

Q. When you spoke of common steers at 16 and 17 cents as the market price, were you speaking of White Faces, white-faced steers?

A. No.

Mr. Olmstead: That is all.

The Court: What is the trade meaning of common; is that restricted?

A. It is a steer that cannot grade above utility, it could be a cross-breed that shows some White Face,—a Hereford Bally steer, and they could be other breed,—I mean they would have other breeding beside White Face.

The Court: That is all I have to ask the witness.

Mr. Olmstead: No other questions.

Mr. Albaugh: That is all.

RAY SKELTON,

recalled as a witness for the plaintiff, having heretofore been duly sworn, testified as follows:

Direct Examination

By Judge Baum:

Q. You were on the witness stand before.

A. Yes, sir.

Q. How long have you been handling livestock?

A. All my life.

Q. And your age now? [99]

A. Forty-three.

Q. How long have you been engaged in the livestock business at Idaho Falls?

A. Since 1938.

Q. Refer to these exhibits, Mr. Skelton, and look at the price range per pound and say whether they refer to good quality steers?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial. There is nothing so far to connect the cattle shown in the account sales with the cattle covered by the contract?

The Court: Overruled.

A. I would say that it does.

Q. What do you mean by "it does." What does it indicate to you?

A. The thinner cattle would be the cheaper cattle.

Q. These cattle that show a price of 24½ cents and 25 cents a pound, what would you say as to them?

A. Killer cattle that brought that price from 24½ cents.

(Testimony of Ray Skelton.)

Q. What is known as common stuff?

A. Any steer of off quality, off breed, Holstein, Jersey or something like that.

Q. Dairy type of cattle? A. That's right.

Q. Not white-faced cattle?

A. No,—that's right. [100]

Judge Baum: That is all.

Cross-Examination

By Mr. Albaugh:

Q. If the White Face cattle were thin they might be classed as common steers?

A. Yes, they could be.

Q. Those cattle that you bought where did they go as feeders.

A. Some of the cattle went to a party in Nebraska, and some to Iowa, I don't know whether they fed or killed them. I don't know whether they resold them or not.

Mr. Albaugh: I guess that's all.

Mr. Olmstead: May we have my letter to you, Mr. Albaugh?

Mr. Albaugh: I will admit that is my letter to you and that the other is your letter to me. I object to the letters as incompetent, irrelevant and immaterial and not binding upon either the defendant or the plaintiff.

Mr. Olmstead: We will call Mr. Ruud for cross-examination, he has been on the stand once.

The Court: Very well.

BERT RUUD,

called by the plaintiff for cross-examination, having heretofore been duly sworn, testified as follows:

Cross-Examination

By Mr. Olmstead: [101]

Q. You are the defendant in this case?

A. Yes, sir.

Q. Mr. Ralph L. Albaugh was your counsel in September, 1947, in reference to the controversy which is the subject of the trial here today?

A. He is.

Q. Was he in,—did you employ Mr. Albaugh and was he your counsel on September 11, 1947, with reference to the controversy now on trial?

A. I don't remember the date I employed him.

Q. Did you give Mr. Albaugh a three thousand dollar check to forward to the American Packing and Provision Company?

A. Yes, sir.

Mr. Albaugh: No, not \$3000.00

Judge Baum: Mr. Albaugh, on September 3rd,—strike that.

Q. Mr. Ruud, at the time you gave him a check for \$3135.00 he was representing you?

A. Yes, sir.

Q. (By Mr. Olmstead): I offer the check at this time, not the check, this letter.

The Court: I think it should be admitted with the provision for the defendant to make any explanation of any knowledge or lack of knowledge he may have had. [102]

(Testimony of Bert Ruud.)

Mr. Albaugh: I would like to make the objection that it is incompetent, irrelevant and immaterial.

Judge Baum: You admit that it is the letter you received.

Mr. Albaugh: Yes, I received that letter and I think it is your signature. I admit I received it.

The Court: I don't think it makes much difference one way or the other but it may be admitted for what it is worth.

Judge Baum: I offer this deposition in evidence at this time.

Mr. Albaugh: Where the witness is here to testify I see no necessity of introducing the deposition. It is, in my opinion, out of order and it is incompetent, irrelevant and immaterial.

The Court: This is the deposition of the defendant himself and I take it you are offering it as a statement against interest.

Judge Baum: Yes, sir.

The Court: It may be admitted. The defendant may explain anything in the deposition.

Deposition of Bert Ruud, taken before Leslie E. Poole, a Notary Public, at Idaho Falls, Idaho, February 24, 1948.

Q. Now, then, was a portion of the purchase price of those cattle paid to you at or about the time the contract was signed? A. No, sir.

Q. Did you ever receive any portion of the purchase price? A. About six weeks later.

Q. And on or about what date, as you recall it?

(Deposition of Bert Ruud.)

A. Oh, between the eighth and tenth of December.

Q. And how much did you receive?

A. Three thousand dollars.

Q. And was that a partial payment of the purchase price of the cattle referred to in the contract?

A. No, sir.

Q. How did you receive that money?

A. Why, Mr. Salerno left it at the hotel, and advised me that he left it there for me to call for it.

Q. Well, did you have any other transactions with this packing company at or about that time, relative to any other cattle?

A. Verbally, yes.

Q. Did you agree to sell other cattle to the packing company? A. Yes.

Q. And what cattle did you agree to sell?

A. Any cattle that I might be able to purchase during the winter.

Q. And those were cattle other than those referred to in the contract? A. Yes, sir.

Q. Now, this three thousand dollars that you received, as you recall some time in December, that was on the purchase price of what cattle?

A. On no particular cattle.

Q. Was it on the purchase of cattle?

A. On cattle that we might be able to buy?

Q. Was it the three thousand dollars that is referred to in the contract?

A. I don't think so, no.

(Deposition of Bert Ruud.)

Q. You think it's some other three thousand dollars that they sent you? A. Yes, sir.

Q. On some other deal? A. Yes, sir.

Q. On what other deal?

A. On some cattle that I might be able to buy, because I couldn't buy the cattle referred to in the contract.

Q. So, you say that the three thousand dollars you got was not the three thousand dollars referred to in the contract?

A. That's right.

Q. But it was for some other cattle that you were going to purchase and deliver to the packing company? A. That's right.

Q. And when were you to deliver those other cattle?

A. That would depend on when I could buy them, and how I could buy them.

Q. Was this contract that the three thousand dollars you received referred to, was that a contract which permitted you to make delivery at any time? A. No, sir.

Q. Then, that's my point. At what time were you to make delivery?

A. There wasn't a set time.

Q. Well, then, you say you were to make delivery at any time?

A. I don't—Do you mean by that, over a period of years?

Q. Well, I am asking you, of course.

A. No.

(Deposition of Bert Ruud.)

Mr. Olmstead: Will you read my last question? I don't know—I don't believe the answer is responsive.

Reporter: (Reading.)

“Question: Well, then, you say you were to make delivery at any time?”

By Mr. Olmstead:

Q. And your answer to that is No?

A. There was no specific time.

Q. Now, then, as I understand, you received this three thousand dollars at the hotel here in Idaho Falls? A. Yes sir.

Q. And do you recall if that was a check of the American Packing and Provision Company?

A. Yes, sir.

Q. And had Mr. Salerno advised you that the check would be left there for you?

A. Yes sir.

Q. And when did he advise you to that effect?

A. Oh, about a day before he left it there.

Q. About a day before? A. Yes.

Q. And was any particular cattle discussed at that time?

A. Just cattle that we might be able to pick up.

Q. So, I understand it, you were negotiating with Mr. Salerno not only for the cattle referred to in the contract, but for other cattle, also; is that correct?

A. No; the cattle referred to in the contract, we were unable to get.

Q. When did you find that out?

A. Oh, after the middle of November.

(Deposition of Bert Ruud.)

Q. After the contract was signed?

A. That's right.

Q. And so you were then dealing with Mr. Salerno for other cattle? A. Yes sir.

Q. I see. So that there were, really, two transactions involved, the first one referred to in the contract, and then a subsequent transaction for the sale of other cattle?

A. Well, the original contract was more or less disregarded.

Q. So that then you proceeded to dicker for other cattle, is that right?

A. I was going to try to, yes sir.

Q. Well, did you? A. Yes sir.

Q. What conversations did you have with Mr. Salerno after this contract was executed?

A. Oh, several.

Q. Can you give me the approximate dates?

A. Before, or after?

Q. After the contract was executed.

A. Oh, each week after—I would meet him each week after the contract was signed, here in Idaho Falls.

Q. Where would you meet him here?

A. Sometimes at the stockyards, and sometimes at the hotel.

Q. You say that you saw him every week after November fourth, Nineteen, forty-six?

A. I believe I saw him every week.

Q. And on each of those occasions you discussed the cattle transactions with him?

A. That's right.

(Deposition of Bert Ruud.)

Q. Was any reference made, in any of those conversations, to the contract that had been signed?

A. Yes sir.

Q. All right, now let's fix the first conversation. When would you say that was?

A. The contract was signed November the fourth?

Q. It bears date of November fourth, yes.

A. I would say within six days after.

Q. And where did you meet him at that time?

A. At the stock yards in Idaho Falls.

Q. And what was the conversation at that time?

A. The conversation was regarding the payment—arranging for the company to pay half on the purchase price of the cattle.

Q. I see. Was anyone else present?

A. Yes, there was several. We were eating at the counter at the stockyards, and there was several boys talking to Mr. Salerno at the same time I was.

Q. Was any other person present, in so far as this conversation was concerned?

A. That I wouldn't know.

Q. You don't know whether anyone overheard the conversation, other than yourself and Mr. Salerno? A. I don't know, sir.

Q. So, about six or seven days after the contract was signed you were discussing with Mr. Salerno the matter of the packing company advancing a portion of the purchase price for some cattle, is that true? A. That's right.

(Deposition of Bert Ruud.)

Q. And you state you asked him if the company would advance it? A. Yes sir.

Q. Do you recall what his reply was?

A. He said he would see when he went to Ogden the following week, and let me know; he would see what they would say about it.

Q. And was that the substance of that conversation? A. Yes sir.

Q. Now, then, you saw him about a week later?

A. Yes sir.

Q. Where did you see him then?

A. At the hotel and the yards, both. We talked both places.

Q. On this particular day? A. Yes sir.

Q. Where did you see him first?

A. At the hotel.

Q. And what was the conversation at that time?

A. He said that the company had refused to advance any money for the purchase of the cattle.

Q. Was anything else said?

A. Then I said, "I wonder if they would be interested in loaning me half of the purchase price, at three percent interest?" And he says, "Well, they loan money on cattle, and I think perhaps that maybe we can. I will check it up and see."

Q. Was anything further said at that time?

A. We decided to wait and see whether they would, or not.

Q. Now, this would be about two weeks after the contract was signed? A. Yes.

(Deposition of Bert Ruud.)

Q. Now, you think you saw him the following week?

A. I believe I saw him within the next three days after that.

Q. That was here, in Idaho Falls?

A. Yes sir.

Q. And did you have a conversation with him?

A. Yes sir.

Q. And what was the substance of that conversation?

A. I believe he said he called up the plant, and they wouldn't—they said they wouldn't loan any money on the cattle.

Q. Was anything further said at that time?

A. Well, we were arguing about the way the contract was originally drawed up, and the shrink, and how incomplete it was, and I was getting tired of waiting back and forth about the deal, and I asked him if he wanted the cattle, or if he didn't.

Q. And what did he say?

A. Well, he says, "I'll see."

Q. And was that the substance of that conversation?

A. Yes.

Q. Now, then, when did you have another conversation with him?

A. I believe the next conversation I had with him was on the telephone at Ogden.

Q. And about when was that?

A. About four or five days later.

Q. Would this still be in November?

A. Yes sir.

(Deposition of Bert Ruud.)

Q. And what was that conversation?

A. I went to the packing plant to see him, and he——

Q. You went to the packing company?

A. Yes. And he had gone home, and I called him on the phone.

Q. You were in Ogden at the time?

A. Yes sir.

Q. All right, what was that conversation about?

A. Oh, the whole thing in general, about the cattle.

Q. Well, now, then, as I understand it, the previous—in the previous conversation he said he would see if the company would lend you the money, is that correct?

A. That's right.

Q. All right. Was any determination made about that matter in this telephone conversation?

A. No; that was determined before.

Q. Well, then, you saw him before the last conversation that you—Strike that, if you please. Your last conversation in Idaho Falls, as I recall your having stated it, was at the time you asked him to ascertain if the packing company would loan money on the cattle; is that correct?

A. Yes sir.

Q. All right. Now, when did you get your answer to that?

A. I think two or three days later.

Q. Was that when you were in Ogden?

A. No, sir.

Q. Oh, I see. All right, let's get to that conversation. Were you—Was that a telephone conversation?

A. Yes, sir.

(Deposition of Bert Ruud.)

Q. Were you in Idaho Falls at the time?

A. No, I was at Ogden.

Q. You were in Ogden at that time?

A. Yes, sir.

Q. You talked to him on the telephone?

A. Yes, sir.

Q. And what was that conversation?

A. Oh, regarding the purchase of some cattle.

Q. Did it relate to this matter of your borrowing money? A. No.

Q. You didn't ask him about that? A. No.

Q. I see. Then, when did you get your answer from him that the packing company wouldn't lend you the money, if ever?

A. Two or three days after I asked him to see if they could do it. Either two or three days, as I stated.

Q. Over the telephone in Ogden?

A. No; right here.

Q. Oh, I see. Right here in Idaho Falls?

A. Right here in Idaho Falls.

Q. Now, your next conversation was over the telephone in Ogden? A. Yes, sir.

Q. And at that time you discussed cattle generally? A. Yes, sir.

Q. Was that about the size of it?

A. Yes, sir.

Q. Do you recall anything specific?

A. Well, we didn't have the cattle purchased, and I told him, and he said he would meet me in Idaho Falls, and we would talk it over. That was

(Deposition of Bert Ruud.)

along about the first of December, and he came back up, and we talked it over, and that's when this check deal came up.

Q. Then about the first of December you had a conversation with him here in Idaho Falls?

A. It was around the first week in December.

Q. And where was that conversation?

A. At the hotel.

Q. That is which hotel?

A. The Rogers Hotel. All of these conversations were at the Rogers Hotel.

Q. Was anyone present at that time, other than yourself and Mr. Salerno?

A. Not that I know of, that would be interested in listening.

Q. You mean not that overheard the conversation?

A. I would say no.

Q. All right. Now, what was that conversation?

A. That was regarding the purchase of cattle.

Q. What was said, if you recall it?

A. Well, I said, "This deal has been going on a long time, and we haven't filled any part of the contract, and there's no money up on it," and I asked him what we should do. And he suggested that I accept the check, and try to buy some cattle during the winter, between two- and three hundred head of cattle, and he said he would leave the check there for me to pick up.

Q. Up to that time you had obtained no cattle?

A. No.

Q. Did you have any cattle at your ranch at that time?

(Deposition of Bert Ruud.)

A. During that time I was cleaning up some fat cattle I had at the ranch.

Q. Then, in this conversation early in December Mr. Salerno said that he would leave the three thousand dollar check at the hotel, and that you could pick it up there, is that correct?

A. That's right.

Q. And the check was left there, and you picked it up, is that right? A. That's right.

Q. What did you do with the check?

A. I deposited it.

Q. When did you next see Mr. Salerno?

A. I don't think I saw him any more until the first week in August the following year.

Q. So, while you saw him every few days during the month of November, and the fore part of December, you didn't see him again for a matter of seven or eight months, is that true?

A. Yes, sir.

Q. You had no further conversation with him about the contract, or any other cattle, subsequent to the time that you received the check until in August, is that right?

A. I believe that's correct.

Q. Now, then, what cattle did you have in August of Nineteen forty-six?

A. I had several steers that I had pastured on my place.

Mr. Albaugh: Do you mean Nineteen forty-six?

A. That's what he said, Nineteen forty-six.

Q. (By Mr. Olmstead): Yes, August, Nineteen forty-six. Several steers?

(Deposition of Bert Ruud.)

A. Yes, I had—I had been selling cattle all through August, and I had, I would say, about a hundred head.

Q. Let me preface this line of questioning with this question: When did your negotiations with Mr. Salerno relative to a possible sale of cattle first commence, if you recall?

A. He tried to buy some of those cattle that were out on the ranch in August.

Q. Of Nineteen forty-six?

A. Of Nineteen forty-six.

Q. And about how many cattle did you have at that time?

A. Oh, I would say thirty, or forty, or fifty head; somewheres along there.

Q. Thirty to fifty head? A. Yes.

Q. Now, then, during September, do you recall what cattle you had, September of Nineteen forty-six?

A. Well, I had around a hundred and fifty.

Q. You were buying cattle, then, during that period? A. Buying and selling.

Q. Now, what about October, Nineteen forty-six, what cattle did you have?

A. I had some of those same cattle left.

Q. Some of this hundred and fifty?

A. No, some of those that was on the ranch.

Q. Some of this thirty to fifty? A. Yes.

Q. You had some of those left? A. Yes.

Q. Now, what about the hundred and fifty that you had in September?

A. I had sold part of those.

(Deposition of Bert Ruud.)

Q. Those were gone? A. Yes.

Q. Do you have a recollection as to about how many cattle you had in October, Nineteen forty-six?

A. Well, I had been buying quite a few fat cattle in August, Nineteen forty-six, and sometimes they would go to the ranch, and sometimes they would go direct.

Q. Was that true in October, Nineteen forty-six? A. Yes.

Q. Well, have you an estimate of the number of cattle you had at that time?

A. Oh, I may have handled two- or three hundred.

Q. You think in October you may have had two- or three hundred cattle? A. Yes.

Mr. Albaugh: Did you say had, or handled?

A. I said handled.

Q. (By Mr. Olmstead): Handled two- or three hundred? A. Yes.

Q. By that you mean you handled them at the ranch?

A. Yes, fed them and sold them out.

Q. What brands do you own, Mr. Ruud?

A. Just one.

Q. And what is that brand? A. Bar-R.

Q. You don't own the O L Hip brand?

A. No, sir.

Q. Do you know whose brand that is?

A. No, sir.

Q. Have you ever seen it? A. Yes, sir.

Q. But you don't know whose it is?

A. No, sir. It's not O L Hip. It's O Left Hip.

(Deposition of Bert Ruud.)

Q. O Left Hip? A. Yes.

Q. All right, to be specific, do you own the O Left Hip brand? A. No, sir.

Q. And you don't know who does own that brand? A. No, sir.

Q. Have you ever seen it on cattle in this area?

A. Yes, sir, in several areas.

Q. Cattle bearing that brand are quite prevalent through this territory? A. Yes, sir.

Q. But you don't know whose they are?

A. They may be several different—have had several owners.

Q. Now, then, in October of Nineteen forty-six, you handled at your ranch, as I understand it, from two- to three hundred head of cattle?

A. That's right.

Q. Now, what about November, Nineteen forty-six?

A. I may have marketed some of those cattle, that I had in October, in November.

Q. Do you have any recollection of it?

A. Just vaguely.

Q. Do you have any records? A. Yes.

Q. Do you have your records with you?

A. No.

Q. You do have records, however, of your cattle marketings during the fall of Nineteen forty-six?

A. Yes, I have records of all of my cattle marketings.

Q. And all of your cattle purchases?

A. That's right.

(Deposition of Bert Ruud.)

Q. And you think that you may have disposed of some of those two- or three hundred head of cattle, that you had in October, in November?

A. That's right.

Q. Did you ever use that O Left Hip brand on any of your cattle? A. Yes.

Q. And was that brand on any of those cattle that you had in the fall of Nineteen forty-six?

A. No, sir.

Q. When had you used that brand before?

A. Oh, several different times.

Q. In Nineteen forty-five?

A. Several years I have used it.

Q. Well, in Nineteen forty-five?

A. I couldn't say for sure.

Q. In Nineteen forty-four?

A. I might have.

Q. Well, do you have any recollection as to when you did use it before? A. No.

Q. Except that you know that you have used it?

A. That's right.

Q. But you didn't use it in Nineteen forty-six?

A. No, sir.

Q. Now, then, in December of Nineteen forty-six, did you have any cattle on your ranch?

A. No, sir.

Q. They were all gone by then?

A. Yes, sir.

Q. Will your records show, Mr. Ruud, the number of head of cattle you had on November third, Nineteen forty-six?

(Deposition of Bert Ruud.)

A. It will show how many cattle I sold during that month.

Q. Will it show how many cattle you had on hand on that date? A. No, sir.

Q. Do you have any records that will show that?

A. Not specific that I could tell for sure, because we marketed so many from one month to another.

Q. Your operation is a large operation, I take it, is is not? A. That's right.

Q. You deal in large numbers of cattle?

A. Oh, I wouldn't say that.

Q. Well, you mean by that it is a large operation, but you don't deal in large numbers of cattle?

A. Well, I deal in a few each month. It's not a large operation, I wouldn't call it. It's just a general operation.

Q. Well, the word is relative, of course, but would you consider, as far as your operations are concerned, that a contract for the sale of three hundred head is a large operation?

A. All at one time, yes.

Q. So, that transaction was a little unusual for you, is that right? A. That's right.

Q. You have sold cattle in that number before, have you not? A. Not all at one time, no.

Q. So, you say that by December first, Nineteen forty-six, you had gotten rid of all your cattle?

A. That's right.

Q. These cattle you had in November, Nineteen forty-six, what kind of cattle were they?

A. Beef cattle.

(Deposition of Bert Ruud.)

Q. Were they fed cattle?

A. Fat cattle and fed cattle. I don't feed grain to no cattle; just grass fed cattle, and hay fed cattle.

Q. What kind of cattle were you selling under the terms of this contract to the packing company?

A. The original deal, as we drew it up, would have been good cattle, had we completed the deal.

Q. Now, then, what do you mean by "good cattle," are you speaking of grade now?

A. No, I mean quality.

Q. A good quality cattle? A. That's right.

Q. What size of cattle?

A. Oh, the cattle would weigh about five hundred and twenty-five pounds.

Q. That's what you had in mind?

A. Yes, sir.

Q. Taking them in the fall of Nineteen forty-six, for delivery the following fall?

A. That's right, yes, sir.

Q. You proposed to feed them there on your ranch?

A. I proposed to pasture them on my ranch, and fatten them in the year Nineteen forty-seven.

Q. And what did you propose to do with them during the fall and winter of Forty-six and Forty-seven.

A. The purchaser was to care for them, and I was to receive them in the spring.

Q. Now, what purchaser is this?

A. I was the purchaser.

(Deposition of Bert Ruud.)

Q. Well, I understood you to say the purchaser——

A. I answered that wrong.

Q. You means the seller? A. The seller.

Q. And what seller did you have in mind?

A. Some fellows by the name of Peterson Brothers.

Q. And where are they located?

A. In Jackson.

Q. So, when you were negotiating with Mr. Salerno for the sale of the cattle covered by the contract, you had in mind that you would acquire the cattle from Peterson Brothers, is that right?

A. Yes; I had a contract up there, and some money, a check there, waiting on the deal.

Q. How many cattle were involved in your contract with Peterson Brothers?

A. Three hundred.

Q. Three hundred head? A. Yes.

Q. Was the brand the O Left Hip brand, do you know? A. No, sir.

Q. Had you seen these cattle that you were buying from Peterson Brothers? A. Yes, sir.

Q. And do you recall what they were branded?

A. They had four or five brands on, because they were owned by four or five brothers.

Q. Was that a written contract that you had with Peterson Brothers? A. Yes, sir.

Q. Do you have a copy of that written contract?

A. No.

Q. Did you ever have a copy of it? A. No.

(Deposition of Bert Ruud.)

Q. Did Peterson Brothers have a copy of it?

A. Yes.

Q. But you never did have one? A. No.

Q. Had you signed it? A. Yes.

Q. And these cattle that you were to get from Peterson Brothers would have weighed about five hundred and twenty-five pounds, is that right?

A. Approximately.

Q. As of what date? A. As of December.

Q. As of December of Nineteen forty-six?

A. Yes.

Q. Now, under your contract with Petersons when were you to get delivery of those cattle?

A. In June of Nineteen forty-seven.

Q. Do you know what the Peterson brothers' first names may have been?

A. Oh, I know them all——

Q. Do they operate their ranching business under this name? A. Yes, sir.

Q. Peterson Brothers, at Jackson's Hole?

A. No, Jackson, Montana.

Q. Oh, Jackson, Montana. Now, you had, as I understand it, three hundred head contracted for from Peterson Brothers, which you were to get delivery of in June, Nineteen forty-seven?

A. That's right.

Q. You had in mind when you got delivery of those cattle to pasture them at your ranch at Irwin? A. That's right.

Q. And then deliver them to the packing company in August and September, as called for under the contract with the packing company?

A. Yes, sir.

(Deposition of Bert Ruud.)

Q. Under normal feeding conditions, such as you had in mind, what would those cattle have weighed at the time of their delivery to the packing company in the fall of Nineteen, forty-seven?

A. About nine hundred pounds.

Q. And these cattle would have graded what, in your judgment, when delivered to the packing company in the fall of Nineteen, forty-seven?

A. That would all depend on the season. You never can guess that far ahead, and how they would do during the winter. It was a year from the time the deal was made until they might be delivered, had we completed the deal.

Q. But, as I understand it, in your judgment they would have been good cattle?

A. That's right.

Q. But, as to whether they would have graded A's, or Double A's, or B's, you wouldn't venture an opinion on that?

A. I wouldn't venture an opinion.

Q. So, when you made this contract with the packing company, which is dated December—or dated November fourth, Nineteen forty-six, you had the specific cattle under contract which you proposed to fill that contract with?

A. I had had a partial agreement and a contract, and left a check with the Brothers for them to decide. I couldn't fully decide, because I hadn't fully closed the deal with Salerno.

(Deposition of Bert Ruud.)

Q. I understand that, but you had a written agreement with Peterson Brothers?

A. Yes, sir.

Q. And it was the Peterson Brothers cattle that you were going to fill the packing company's contract with?

A. Yes, sir.

Q. And then Peterson Brothers, for some reason or other, fell down on their deal with you, is that it?

A. Yes, sir.

Q. When did you find out that Petersons wouldn't make good under their contract?

A. I believe along about the fifteenth, between the tenth and the fifteenth of November.

Q. Of what year?

A. Nineteen, forty-six.

Q. And was that by virtue of a letter of some sort?

A. No, that was partly because I was stalling on the deal, and partly because the price of cattle was raising so fast that they decided not to sell them.

Q. Did you make any attempt to pursue your remedies under this contract with Peterson Brothers?

A. In what way?

Q. To enforce delivery—to enforce that contract?

A. No; my date had expired, and I couldn't.

Q. Well, you were to take delivery in June, Nineteen forty-seven, were you not?

A. Yes, but I didn't have the—didn't have all their signatures.

(Deposition of Bert Ruud.)

Q. Oh, I see. And it was about November fifteenth, Nineteen forty-six, when you ascertained that you probably wouldn't be able to get the Peterson Brothers cattle, is that right?

A. I wouldn't give the date exact, but I think it was about that time.

Q. It was after the fourth day of November?

A. Yes.

Q. You had seen these cattle that you proposed to get from Peterson Brothers? A. Yes, sir.

Q. And knew their size, and their quality and condition? A. Yes, sir.

Mr. Olmstead: That is all of Mr. Ruud at this time.

Mr. Albaugh: No questions. [103]

E. W. FALLENTINE

Called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Olmstead:

Q. Where do you reside Mr. Fallentine?

A. Ogden, Utah.

Q. Your occupation?

A. Vice-president and General Manager American Packing and Provision Company.

Q. That is the plaintiff in this action?

A. Yes, sir.

Q. How long have you held that position?

A. Since 1937.

Q. You are familiar with the contract which is the subject of this action, and which has been received in evidence as exhibit number 1.

A. I am.

(Testimony of E. W. Fallentine.)

Q. I will ask you if any deliveries have been made by the defendant Ruud under that contract to your company?

A. No cattle have been delivered under this contract.

Q. Mr. Fallentine, did you state how long you had held this position with the American Packing and Provision Company, the plaintiff here?

A. Since 1937. [104]

Q. What was your occupation before that?

A. I have been with the company in various capacities.

Q. And as General Manager since 1937?

A. That is correct.

Q. How many cattle a year are processed through this plant?

A. Thirty-four to 36 thousand head.

Q. What is the average dressed weight yield, percentage wise of good quality steers?

Mr. Albaugh: We object to this there is nothing to say the cattle under the contract must be of good quality.

The Court: He may answer.

A. U. S. good quality steers in order to grade "good" will have to yield between 56 and 61 per cent.

Q. You mean the dressed weight is 57 to 61 per cent of the live weight?

A. Yes, that is correct.

Q. If a live animal weighed 1,000 pounds then the dressed weight would be 570 to 610 pounds?

A. That is right.

(Testimony of E. W. Fallentine.)

Q. Do you know the mathematical formula for converting $17\frac{1}{2}$ cent live weight price into dressed weight price, basing the yield, for example on 59 per cent? A. Yes, sir.

Q. What is that formula? [105]

Mr. Albaugh: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Fifty-nine divided into seventeen and a half would give the cost of the animal dressed. That would be the cost of the animal dressed but other things enter into the picture.

Q. What I am getting at is that the $17\frac{1}{2}$ cent a pound price live weight is converted into the dressed cost by that formula.

A. Dividing fifty-nine into seventeen and a half.

Q. And to convert dressed weight back to live weight, what is the formula?

A. You multiply by 59.

Q. To convert dressed weight back to live weight cost you multiply instead of divide.

A. You multiply the dressed weight by the percentage—that is the dressed weight price by the percentage.

Q. So if you had a dressed weight price of 29.66 and a yield of 59 per cent, you multiply 29.66 times 59 to convert it to live weight price.

A. That's right.

Q. What would you get.

A. Seventeen fifty.

(Testimony of E. W. Fallentine.)

The Court: I would like to know a little [106] more clearly than it is in the record how you do this, how it works.

A. Well, if an animal costs $17\frac{1}{2}$ cents a pound and the yield is 59 per cent, then you divide 59 into $17\frac{1}{2}$ and that would be the cost of the animal dressed. The animal only yields, if he is a thousand pound animal, he only yields 590 pounds dressed and consequently you take the 59 per cent and divide it into $17\frac{1}{2}$ and it makes the cost of the live animal, or live weight 29 cents or whatever it comes to, or might be, when dressed.

Q. And the same would be true whatever you paid live weight for the animal.

A. Yes, and whatever the yield was, if he weights a thousand pounds and when we killed it weighed 570 pounds then the yield would be 57 per cent and if it weighed 560 dressed, it would be 56 per cent, and so you divide the yield into the cost, live weight to get the cost dressed weight.

Q. And to convert the dressed back to live weight, you multiply the 59 or whatever the per cent is by $17\frac{1}{2}$ if that was the live weight.

A. Yes, I think that is the correct figure here.

Mr. Olmstead: Is that clear your Honor.

The Court: It is clearer than it was before.

Mr. Olmstead: That is all, you may examine.

Cross Examination

By Mr. Albaugh:

Q. Now, this three per cent shrinkage, what is that figured on, would that be computed on the live weight?

(Testimony of E. W. Fallentine.)

A. Three per cent on the live weight, is that what you said.

Q. That is three per cent of the dressed weight isn't it Mr. Fallentine?

A. Three per cent on the 29.66 price, on the dressed weight.

Q. That would be shrinkage on the dressed weight?

A. That would be the three per cent shrinkage.

Q. As a matter of fact, three per cent shrinkage deducted from the dressed weight is equal to more than five per cent deducted from the live weight in dollars and cents isn't it?

A. Can I explain this. Normally a thousand pound steer that yields 600 pounds hot weight shrinks and that has been determined by packing houses throughout the United States to be a certain percentage. Over a number of years the packing industry through their experience shows that an animal will shrink that amount from hot weight to cool weight.

Q. My question is what the shrinkage would amount to, not why it would amount to some figure.

The Court: According to this it would amount to 18 pounds.

A. It would be on a 59 or 60 per cent yield.

Q. That would be on a thousand pound steer.

A. Yes, taking a thousand pound animal.

Q. Somewhere around \$6.00 a head.

A. That would be about right.

(Testimony of E. W. Fallentine.)

Q. Mr. Fallentine, you testified that no delivery was made by Mr. Ruud under this contract.

A. Under this contract there was no delivery.

Q. Did Mr. Ruud ever make an offer to deliver to you under this contract?

A. None whatever.

Q. Did you receive a letter under date of August 22, 1947 from Mr. Ruud?

A. I would like to see the letter so I may testify intelligently. This letter I have read but I did not read it at the time of the contract.

Q. Will you read it now? A. I have.

Q. Who is it addressed to?

A. To Louie Salerno.

Q. Attention of Mr. Salerno?

A. No, it is addressed to Mr. Salerno.

Q. Is that the letter of August 27th?

A. No, November 12. This was not read by me until the last trial, that is, the first trial here, that was the first time I saw this letter. This one I have now, is addressed to American Pack attention Mr. Salerno. Mr. [109] Salerno did tell me over the phone about this.

Mr. Albaugh: May we have it marked.

Q. Calling your attention to exhibit 11, that is a letter that was received by the American Packing and Provision Company. A. Yes sir.

Q. And it was in their possession from shortly after it was dated so far as you know?

A. I believe that Mr. Salerno kept this in his files, I don't remember it in our files.

(Testimony of E. W. Fallentine.)

Q. Mr. Salerno was your buyer?

A. Yes sir.

Q. He was handling this Ruud transaction.

A. Just buying, he hasn't authority to buy on contract without my signature. I am the only one authorized to do that.

Mr. Albaugh: We offer in evidence at this time, exhibit 11.

Mr. Olmstead: Objected to as incompetent, irrelevant and immaterial, it is not a offer to deliver under the contract at the contract price, but to deliver some cattle and some price in excess of the contrate price.

The Court: It seems that this is a proposal to deliver cattle at a different price. I will admit it and such parts as are incompetent, I will disregard.

Mr. Albaugh: I call the Court's attention to the last part of paragraph 3.

The Court: The letter will be admitted for what it is worth, under the conditions, as I have heretofore stated, I have been very liberal here and I will permit this to go in at the present time.

DEFENDANT'S EXHIBIT No. 11

Irwin, Idaho, Aug. 22, '47.

American Packing and Provision Co.,
Ogden, Utah.

Attention L. Salerno:

With reference to our different talks on this cattle contract wish to submit the following to try to fill the contract.

(Testimony of E. W. Fallentine.)

In as much as we did not get the cattle referred to in the contract I am willing to let you have the cattle we have at the ranch delivered to Ogden and weighed off trucks at 19 cents per lb. and ship only what will Grade A or better and you can grade them here or I will sort them as we ship them and you can start to take them any time now and string them out as you wish.

As I have explained to you these cattle stand me this much and as the prices rose so fast after we made the deal and so many cattle that I expected to fill this deal with went back on their deal and I did not get them as I explained to you when here, and therefor I am willing to let you have these at cost or if you cannot use them at that I will put in other cattle by First of Oct. and get rid of these.

You have never seen these steers yet only in the 9 head that you purchased in Idaho Falls that were my Son's and the balance will compare to them only they are getting better each day.

Yours truly,

/s/ Bert Ruud.

Mr. Albaugh: That is all.

Redirect Examination

By Mr. Olmstead:

Q. Mr. Fallentine will you refer to exhibit 12 and tell us what is that? A. It is a letter.

Q. Addressed to whom?

A. American Provision Packing Company.

Q. What is the date of that? -

(Testimony of E. W. Fallentine.)

A. August 28, 1947.

Q. Whose signature does that purport to bear?

A. Bert Ruud.

Mr. Olmstead: We offer in evidence exhibit 12 if the Court please?

Mr. Albaugh: We have no objection to the introduction of exhibit 12 as to the face of the letter but there is some hand writing on the back by some person. That, of course, will not be admitted without objection.

Mr. Olmstead: That is not to be a part of the offer. [111]

The Court: I think that is understood, that the writing on the back of the exhibit is not to be considered. It may be admitted.

Mr. Olmstead: We rest at this time.

Mr. Albaugh: The defendant moves that the action be dismissed on the ground that the evidence does not show that the contract was ever delivered, but on the contrary it affirmatively shows that the contract was never delivered. There was never a meeting of the minds or mutuality, and it shows that there were still points of dispute between the plaintiff and the defendant in regard to the terms of the contract, and we move for a dismissal on the further ground that the subject matter of the contract has never been identified; that it is impossible to ascertain from the contract or from any evidence before the court, the age of the cattle in question; the weight of the cattle or the type of the cattle and without these matters and these

facts before the Court it is impossible to compute damages and any damages that might be computed must be based upon conjecture and not on the contract or the evidence before this Court. We move for dismissal of the action on the further ground that the plaintiff has failed to prove a cause of action or any damages in this case. We further move for a dismissal of the action on the ground that the plaintiff [112] has failed to prove performance. Plaintiff alleges in its complaint that it had done and performed everything required to be done and performed in the contract and we have denied that and there is no proof before the Court on the part of the plaintiff that they ever paid the \$3,000.00 required to be paid by and under the contract.

The Court: What is the record on the \$3,000?

Mr. Olmstead: The contract acknowledges receipt of \$3,000, and the letter of Mr. Albaugh's recites that last November \$3,000 was paid by the plaintiff to this defendant under this contract and for certain reasons he is tendering it.

The Court: You are satisfied with the condition of the evidence.

Mr. Albaugh: I differ with counsel on my letter.

The Court: The motion is overruled, you may proceed with your case. I want to weigh all these questions which are by no means free from doubt in the Court's mind but that is a matter to be considered in the ultimate decision of the Court.

Mr. Albaugh: We will call Mr. Salerno as an adverse witness.

LOUIS SALERNO

Called by the defendant, after being first duly sworn, testifies as follows: [113]

Cross Examination

By Mr. Albaugh:

Q. Your name is Louis Salerno?

Mr. Olmstead: We object to this witness being called as an adverse witness under the rules of this Court the managing agent may be called as an adverse witness. Certainly they must show first that Mr. Salerno is a managing agent.

The Court: Counsel may proceed with his questions and we will see. He may answer the question.

Q. You may state your name.

A. Louis Salerno.

Q. Your age. A. Forty-three.

Q. Your occupation?

A. Livestock buyer for the American Packing and Provision Company.

Q. As livestock buyer what are your duties?

A. I am in charge of the buying of livestock for slaughtering and feeding for the American Packing and Provision Company.

Q. How many men do you have under you?

A. Three.

Q. How many men did you have, in the fall of 1946, working under you? A. Three.

Q. In August and September 1947, how many did you have under you? A. Three. [114]

Q. Then you are the Chief livestock buyer for the American Packing and Provision Company and these men work under you?

A. I am head buyer.

(Testimony of Louis Salerno.)

Q. You and the men working under you buy all the livestock for the corporation?

A. Our daily purchases, yes sir.

Q. Did you negotiate for the plaintiff corporation, this contract that is in dispute in this case?

Judge Baum: Now, we renew our objection this is not a witness that comes within the rule.

The Court: They can make him their own witness, this witness does not come within the rule.

Mr. Albaugh: I take it that he would come under the hostile witness rule.

The Court: You may ask leading questions.

Judge Baum: But he is calling him as his own witness.

The Court: That's right, he is the defendant's witness. A. To a certain extent, yes sir.

Q. To your knowledge did Mr. Ruud ever see any other officer of the corporation?

A. No sir.

Q. So that you were the one that handled all of the conversations [115] and contacts with Mr. Ruud in negotiating this contract?

A. Yes sir.

Q. Then in the summer of 1947 in August you went to the Ruud Ranch? A. Yes sir.

Q. And you looked at the cattle he had on the ranch? A. From the road.

Q. I think you bought some of those cattle for the American Packing and Provision Company later? A. Yes sir.

(Testimony of Louis Salerno.)

Q. Now, Mr. Salerno, those cattle he had on the ranch were Wyoming cattle were they not?

A. From the description given here, yes. Yes sir, from the description given this morning.

Q. When this contract was negotiated with Mr. Ruud you knew that Mr. Ruud had no cattle on his ranch? A. Yes sir.

Q. This contract was made from notes and instructions that you gave to the plaintiff's attorney in Ogden, Utah was it not? A. Yes sir.

Q. Was Mr. Olmstead that attorney?

A. Yes sir.

Q. You knew that Mr. Ruud had no cattle on the ranch when the [116] contract was made, did you not?

A. When we was first dealing, yes, but when he signed the contract I presume he had the cattle.

Q. You knew did you not that Mr. Ruud had no feed on the ranch to feed cattle, and that it was strictly a grazing proposition?

A. Yes sir.

Q. You knew he didn't intend to keep any cattle that winter.

A. I didn't know where he was going to winter them. He told me he would **have to buy** hay to winter the cattle.

Q. Your deposition was taken on the 27th of January, 1948 in this action, was it not?

A. Yes I guess that was the date.

Q. You say now that you presume or thought that Mr. Ruud had cattle on the ranch when he signed this contract.

(Testimony of Louis Salerno.)

A. I presume he had the cattle bought because he wrote a letter stating that he had the cattle bought.

Q. It also stated that he had some to receive yet.

A. Yes.

Q. But you knew that he didn't intend to feed them on the ranch that winter?

A. I don't know where he was going to winter them.

Q. You knew there was no hay to feed them?

A. I knew that he could buy hay and haul it in.

Q. You have been buying cattle for many years?

A. Yes sir. [117]

Q. And you knew that it wasn't feasible?

A. As a rule it usually is that they feed the cattle where they buy the hay, yes sir.

Q. And Mr. Ruud never attempted to feed cattle on the ranch, you knew that. A. No sir.

Q. Didn't you discuss that with him?

A. No sir.

Q. Why did you have the attorney insert in this contract that there was 300 head of cattle branded O left hip, on that ranch?

A. We always put the brand in the contract.

Q. Three hundred head of cattle on the ranch, why did you have that inserted in the contract?

A. When I was dealing with Mr. Ruud he said he would have the cattle, he would buy the cattle and we left a blank space for the brand.

Q. Why did you have the attorney for your company state there was 300 head of cattle on the ranch?

(Testimony of Louis Salerno.)

A. From my conversation with Mr. Ruud, he was to buy that many cattle.

Q. Then he was to bring them to the ranch?

A. Yes sir.

Q. That was your understanding.

A. Yes sir. [118]

Q. When was he to bring them to the ranch?

A. There was no specific time when he was to bring them to the ranch.

Q. You remember your testimony on that deposition I mentioned?

A. Yes, I remember the deposition.

Q. Now, will you take the deposition which has been handed to you, at page 16 down to the bottom of page 16, the question there from me directed to you Mr. Salerno: "I believe you just stated it was your understanding that he was to winter them in Wyoming and bring them to his ranch in the spring?" and your answer: "That is what Mr. Ruud told me; yes sir."

Judge Baum: We object to this form of examination, it is apparent he is seeking to impeach this witness.

The Court: There could be no other purpose.

Judge Baum: And we object as it is improper, within the rule.

The Court: I think it is unless you bring the witness within the rule.

Q. Mr. Salerno, you were still the head cattle buyer for the American Packing and Provision Company in August, 1947?

A. Yes sir.

(Testimony of Louis Salerno.)

Q. And that is the plaintiff corporation?

A. Yes sir. [119]

Q. You were negotiating with Mr. Ruud in regard to the delivery of the cattle were you not?

A. Yes sir.

Q. And you went to his ranch to see him?

A. Yes sir.

Q. And you called him on the telephone at Afton, Wyoming? A. Yes sir.

Q. Now, were you instructed to go and see Mr. Ruud at that time, by your company?

A. Yes sir.

Q. Were you instructed by your company to attempt to negotiate with Mr. Ruud over the delivery of some cattle?

A. Yes, I was there to receive the cattle.

Q. You did that did you? A. Yes sir.

Q. Did you demand from Mr. Ruud these Wyoming cattle that he had on that ranch?

A. I demanded the cattle that he was to fill the contract with?

Q. What cattle?

A. I never saw the cattle.

Q. You never did see the cattle under the contract? A. No sir.

Q. These Wyoming cattle on the ranch were not the cattle covered by the contract were they?

A. They were not carrying the branch that the contract called for, no sir.

(Testimony of Louis Salerno.)

Q. You didn't claim at that time that these cattle on the ranch were cattle covered by your contract?

A. No sir, we had no way to prove it.

Q. You have heretofore stated they were not the cattle? A. I had never seen the cattle.

Q. Just answer the question. You have heretofore stated that they were not the cattle covered by the contract?

A. They were not branded with the brand covered by the contract.

Q. You are pretty well acquainted with the cattle all through that country? A. Yes sir.

Q. The reason you didn't demand these cattle was because you knew they were not the cattle covered by the contract, is that true?

A. Well—

Q. Just answer the question yes or no.

The Court: I think the witness should have more latitude than a yes or no answer.

Q. I think you stated you didn't demand the cattle on the ranch under this contract.

A. No sir.

Q. Why didn't you demand them? [121]

Judge Baum: We submit this is immaterial.

The Court: He may answer.

A. I couldn't demand those cattle because they didn't carry the brand the contract called for.

Mr. Albaugh: Now Mr. Bailiff will you hand the witness the letter dated October 31, 1946 from the witness to Mr. Ruud?

(Whereupon exhibit was handed to witness.)

(Testimony of Louis Salerno.)

Q. Is that your signature on that letter?

A. Yes sir.

Q. What exhibit is that?

Mr. Clerk: This will be exhibit 13 when it is marked.

Q. Is that the letter that accompanied the contract which is exhibit 1, when you sent the contract to Mr. Ruud? A. Yes sir.

Mr. Albaugh: We offer in evidence at this time exhibit 13.

Mr. Olmstead: We have no objection.

Q. Now, you have a letter from Mr. Ruud addressed to Mr. Salerno, dated November 12, 1946 will you state what that is please?

A. It is a letter from Ruud to myself.

Q. You received it, did you? A. Yes sir.

Q. You delivered it to your company?

A. As to whether anybody else read it I couldn't say. I had it filed at my desk.

Q. You were working as the head cattle buyer for the American Packing Company?

A. Yes sir.

Q. You received this letter at the office of the American Packing and Provision Company, at Ogden, Utah? A. Yes sir.

Q. Where was it kept? A. At my desk.

Mr. Albaugh: We offer exhibit 14 in evidence.

Mr. Olmstead: We object on the ground that it is incompetent, irrelevant and immaterial. It is subsequent to the execution of the contract and cannot operate to vary the terms of the contract.

(Testimony of Louis Salerno.)

Mr. Albaugh: It very clearly shows that there was no meeting of the minds and no consummation of the contract at that time.

The Court: This letter does have some bearing on the letter that accompanied the contract at the time the defendant returned it as regards the three per cent shrink. For that purpose it may be admitted.

DEFENDANT'S EXHIBIT No. 14

Headquarters Sixth Army
Office of the Commanding General
Presidio of San Francisco, California

[In black pencil] as to 3% shrink.

Irwin, Idaho, Nov. 12, '46.

Mr. Louie Salerno,
Ogden, Utah.

Dear Sir,

I am in receipt of your letter relative the contract and I cannot see how I can make these cattle yield 59 when I have to take a 3% shrink on the dressed weight as last year they yielded 60 plus off cars at L. A. and weighed as soon as they were peeled and you can cite the difference Ogden.

Now, can't we make this contract read 30 cents for A 32 cents for AA and 28 for B grade, and figure on just the dressed weight and cut the shrink to 1½% as some Packers I find shrink from this to 2½% I am suggesting this to try to get to the point of our verbal agreement and if you will let me know where I can meet you I will try to or I

(Testimony of Louis Salerno.)

may come to Ogden next week if you will be home let me know and we will try to get this closed.

Yours truly,

/s/ BERT RUUD.

Q. Now Mr. Salerno, this letter marked exhibit 15 what is that exhibit? [123]

A. A letter from myself to Mr. Ruud.

Q. Is that your signature? A. Yes sir.

Q. You were still negotiating with Mr. Ruud for the American Packing and Provision Company?

A. Yes.

Q. And in the employ of the American Packing and Provision Company? A. Yes sir.

Mr. Albaugh: We offer in evidence exhibit 15.

Mr. Olmstead: We object to it as incompetent, irrelevant and immaterial and subsequent to the execution of the contract. No authority is shown on the part of this witness to vary the terms of the contract or make any additional contract. The contract was between this defendant and the managing officer of the company.

The Court: Objection sustained.

Q. During this correspondent from November 4 to November 15 were you discussing the contract with the officers of your company?

A. They had drawn up the contract, that was the way I mailed it to him. I couldn't change it and I so stated to him. I don't have authority to change any contract.

Q. When did your authority cease?_-

A. On future purchases Mr. Fallentine has to sanction all contracts. [124]

(Testimony of Louis Salerno.)

Q. Then these letters—withdraw that please—finally along in December there was a check left at the Rogers Hotel? A. Yes sir.

Q. Who left that there? A. I did.

Q. Was that after your authority ceased—I will withdraw the question.

Mr. Albaugh: I think that is all at this time, however, I would like to have the right to recall the witness later.

Judge Baum: If we understand that the witness is to be recalled may we have the right to reserve our cross examination until that time?

The Court: If he is not called, then you will have to recall him for cross examination.

Judge Baum: May we reserve that right?

The Court: I think so. I think we will recess

Q. He mailed that one back? [127]

May 26, 1948, 10 o'clock a.m.

Mr. Olmstead: I think we will go ahead with the cross examination of Mr. Salerno with the Court's permission.

The Court: Very well.

Cross Examination

By Mr. Olmstead: [125]

Q. Mr. Salerno when you first commenced your negotiations with Mr. Ruud in respect to these cattle mentioned in the contract in October 1946—

A. Yes sir.

Q. I hadn't finished the question.

A. Pardon me.

Q. When you commenced the negotiations in October what was the occasion for this first con-

(Testimony of Louis Salerno.)

versation was it a matter brought up by Mr. Ruud or by you? A. Mr. Ruud.

Mr. Albaugh: That is not proper cross examination and we move it be stricken—that the answer be stricken for the purpose of objection.

The Court: Overruled.

Q. Mr. Ruud approached you?

A. Yes sir.

Q. Where was that?

A. At the hotel in Idaho Falls.

Q. When was that?

A. Along the first of October.

Q. Did you have a conversation with him at that time? A. Yes sir.

Q. State what that conversation was?

Mr. Albaugh: I object to this, I did not go into the conversation.

The Court: I will sustain the objection. [126]

Q. Do you recall the last time you saw Mr. Ruud prior to November 4, 1946?

Mr. Albaugh: I make the same objection, this is not proper cross.

The Court: Overruled.

A. I can't say the exact date. I saw him about every week I was attending sales at Idaho Falls.

Q. About every week in October 1946?

A. Yes sir.

Q. Under date of October 31, 1946 as reflected by exhibit 13, you mailed to Mr. Ruud copies of a proposed contract that had been the subject of your negotiations? A. Yes sir.

(Testimony of Louis Salerno.)

The Court: Were they copies of executed contracts?

Q. Were they signed at the time you mailed them?

A. One was signed by Mr. Fallentine; the other was not signed then.

Q. Mr. Fallentine had signed one of the copies you sent under date of October 31st?

A. Yes sir.

Q. Sometime after November 4, you received a copy signed by Mr. Ruud? A. Yes sir.

Q. He mailed that one back? [127]

A. Yes sir.

Q. That was accompanied by the letter of November 3, 1946? A. Yes sir.

The Court: This copy you mailed to Mr. Ruud had been signed on behalf of your company, is that right?

A. Yes sir, one retained by him was signed.

Q. The Court: You send him two copies, one signed and one not signed? A. Yes sir.

Q. After November 4, 1946, did you see Mr. Ruud at various intervals?

A. Not until the fall of 1947.

Q. After November 4 in 1946 did you see Mr. Ruud?

A. I didn't see him but I talked to him over the phone.

Q. You saw him during the month of August, 1947? A. Yes sir.

Q. Where did you see him about the first of August, 1947? A. Grey's River.

(Testimony of Louis Salerno.)

Q. Where is that?

A. Wyoming, just across the state line.

Q. Where is that from Mr. Rudd's ranch?

A. I don't know the direction.

Q. In the vicinity is it? A. Yes sir.

Q. Had you gone there to see Mr. Ruud? [128]

A. Yes sir.

Q. Did you have a conversation at that time?

A. Yes sir.

Q. When was that?

A. Around the 9th or 10th of August.

Q. Was anyone present other than you and Mr. Ruud?

A. My wife was in the car, I don't think she heard the conversation.

Q. So far as the conversation was concerned just you and Mr. Ruud was present? A. Yes sir.

Q. State to the Court what that conversation was.

Mr. Albaugh: Objected to as not proper cross-examination. I didn't examine the witness as to that conversation of August 9th or 10th.

The Court: Overruled.

A. I attended the sale at Idaho Falls, and there was nine head of—

Q. —the question was as to the conversation.

A. I went up to make a demand for the cattle covered by the contract.

Q. Did you make demand? A. Yes sir.

Q. What did Mr. Ruud say?

A. He said he didn't have any cattle under that contract. [129]

(Testimony of Louis Salerno.)

Q. Was that in substance the extent of that conversation? A. Yes sir.

Q. Did you see Mr. Ruud again in August?

A. Yes sir.

Q. When was that, approximately?

A. The latter part, I don't know just what date it was.

Q. Was it toward the end of August?

A. Yes sir.

Q. Where did you see him at that time?

A. At the ranch.

Q. Near Irwin, Idaho. A. Yes sir.

Q. Was this contract the subject of that conversation?

A. I went up to make demand for the cattle covered by the contract.

Q. You went back for that a second time?

A. Yes sir.

Q. What was said then, if anything?

A. That he wouldn't deliver the cattle under the contract; he said he didn't have any cattle covered by the contract.

Q. In any of the conversations you had with Mr. Ruud or any dealings with Mr. Ruud during August or September 1947 was any offer made by Mr. Ruud to deliver cattle other than embodied in the letters sent?

Mr. Albaugh: Objected to as improper cross-[130] examination, and incompetent, irrelevant and immaterial.

The Court: Overruled.

(Testimony of Louis Salerno.)

A. He offered to deliver what cattle he had on the ranch for more money if we cancelled the contract.

Mr. Albaugh: Move to strike the answer as not responsive.

The Court: It may stand.

Q. Was any offer made other than stated in your answer? A. No sir.

Q. Do you recall when that was made?

A. I think the first of September, the first part.

Q. Was that on the occasion of your visit to his ranch? A. Yes sir.

Mr. Olmstead: That is all.

Mr. Albaugh: That's all.

BERT RUUD

Called as a witness by the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Albaugh:

Q. You are the defendant in this action?

A. Yes sir.

Q. And you have heretofore testified in this case, and were sworn at that time?

A. Yes sir.

Q. What is your age? [131]

A. Fifty-eight.

Q. How long have you been engaged in the business of cattle raising Mr. Ruud?

A. Thirty years or more.

Q. And ranching? A. Yes sir, the same.

(Testimony of Bert Ruud.)

Q. How long have you lived in Irwin, in the eastern part of Bonneville County, Idaho?

A. Thirty years.

Q. How many acres of land do you have there?

A. Nearly a thousand.

Q. Dry farm or irrigated? A. Both.

Q. What do you use it for, principally?

A. Dry land to raise grain and the irrigated for pasture.

Q. What is the altitude there?

A. Around 6100 feet.

Q. You were on this same ranch in October, November and December, 1946? A. Yes sir.

Q. At that time did you have, in November, about November 4, did you have any cattle on that ranch? A. November 4th.

Q. Yes, 1946?

A. No, I had none except just milk cows. [132]

Q. Did you own three hundred head of cattle at that time? A. No sir.

Q. Did you own three hundred head of steers branded O on left hip?

Mr. Olmstead: We object to this as tending to vary the terms of a written contract.

The Court: This is obviously an attempt to vary the terms of this contract.

Mr. Albaugh: This is to show conditional delivery of the contract.

The Court: That again would vary the terms. Do you expect to show an impossibility of fulfillment of the contract?

(Testimony of Bert Ruud.)

Mr. Albaugh: No, but to show that it was delivered conditionally, to take effect upon the obtaining of the cattle.

The Court: I understood this conditional delivery to be predicated on the letter of November 3rd, having to do with the shrinkage.

Mr. Albaugh: Both, based on shrinkage and the conditional delivery to take effect when he could obtain the cattle.

The Court: It is difficult to imagine in this case an attempt to vary this by parole evidence.

Mr. Albaugh: The parole evidence is not [133] varying the terms of the contract if the Court please. It is to show that it was to take effect upon the happening of certain conditions.

The Court: Let me call your attention to the provisions that the 300 head owned by and held on the seller's ranch were to be delivered—

Mr. Albaugh: —That was erroneous.

The Court: You have not asked for a rescission of the contract. The objection is sustained.

Q. Who had this contract prepared?

A. Mr. Salerno.

Q. That is the contract, exhibit 1 here.

A. Yes sir.

Q. Were you present when it was prepared, Mr. Ruud? A. No sir.

Q. Did you submit any memorandum in writing, or any notes of any kind, directing Mr. Salerno how to prepare this contract?

(Testimony of Bert Ruud.)

Judge Baum: Objected to as incompetent, irrelevant and immaterial, the evidence shows he signed it as his contract.

The Court: I understand these negotiations are such as would be merged into the written contract. The objection is sustained.

Q. Did you have a conversation with Mr. Salerno prior to [134] the time you signed this contract in regard to the purchasing of steers to fill the contract?

Judge Baum: Objection if the Court please, upon the ground that it is incompetent, irrelevant and immaterial, all prior negotiations having been merged into the subsequently written contract.

The Court: I think the objections will be sustained.

Mr. Albaugh: In order to shorten the time required here. It is impossible as we view it, to enforce a contract where the subject matter is not in existence. It was not in existence here and never was. That fact, we think we are entitled to show. This is not an action for fraud and deceit against the defendant for selling something he didn't own. It is impossible for there to be a contract if the subject matter is not in existence. We would like to show that the subject matter never was in existence and that the contract was conditionally delivered.

The Court: A man cannot contract to deliver cattle in the future, you mean.

Mr. Albaugh: If they are identified, yes, if the delivery of the contract is not conditional upon him obtaining the cattle. [135]

(Testimony of Bert Ruud.)

The Court: Is it your thought that this contract was or is so uncertain as to be void?

Mr. Albaugh: Unless the subject matter can be identified.

The Court: I am talking about the contract itself as it stands. You think it is such a contract that the intent of the parties cannot be gathered from the instrument itself?

Mr. Albaugh: No sir, it cannot be.

The Court: And as it is, it tends to render negatory the entire contract.

Mr. Albaugh: The delivery of this contract was conditional. We think we should be permitted to show these facts.

The Court: You may proceed.

Q. Mr. Ruud did you ever obtain the cattle which you intended to make the subject matter of this contract?

Judge Baum: Objected to as incompetent, irrelevant and immaterial, tending to vary the terms of a written instrument.

The Court: It is immaterial. On that ground I will sustain the objection. You may have pleaded in one paragraph impossibility of fulfillment.

Mr. Albaugh: This goes to the understanding that the contract was to take effect when he got these [136] cattle.

Q. At the time you signed this contract I believe you had some cattle in Wyoming, some steers?

A. Yes I had all kinds of cattle in Wyoming, steers, cows and heifers, different kinds.

(Testimony of Bert Ruud.)

Q. Was there a variation in ages of these cattle?

A. Yes.

Q. What was that?

A. All the way from yearlings to four or five year olds.

The Court: Confine this to steers.

Q. Did this 218 head of steers vary in age?

A. Yes sir.

Q. What was or what would be that variation?

A. All the way from yearlings to long twos.

Q. Were these cattle you had in Wyoming the subject matter of this contract, exhibit 1?

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: There was evidence introduced that these steers, or tending to show that these steers were subject to delivery the following year. I think the objection will be overruled. A. No sir.

Q. Where were the cattle which was the subject matter of this contract, or intended to be the subject matter? [137]

Judge Baum: Objected to as incompetent, irrelevant and immaterial, the contract speaks for itself in that regard.

The Court: Overruled.

A. Can I explain my answer—the way the contract was drawn up—

Q. Answer the question.

A. The way the contract was drawn I was to purchase the cattle for Mr. Salerno, and to have them dehorned to his satisfaction which the con-

(Testimony of Bert Ruud.)

tract recites, and then we were to brand them with a circle for identification. As to where they were to be, that was where I could purchase them either in Montana, Wyoming or Idaho.

Judge Baum: I move to strike all the answer except the last phrase which was in response to the question.

The Court: It may be stricken except the last portion of the answer.

Q. Now these cattle that you had in Wyoming, had they been dehorned? A. Yes sir.

Q. This contract provides that you should dehorn these at your expense at the proper dehorning time. The cattle covered by the contract; what does that indicate to you as a cattle man, about the age of the cattle?

Judge Baum: We object to that as incompetent.

The Court: He may answer.

A. The contract says—

Q. —What does that indicate to you as a cattle man?

A. Small cattle that they wanted me to purchase.

Q. What do you mean by small cattle?

A. Yearlings.

Q. Long yearlings or short yearlings?

A. Could be either, mostly short yearlings, I would say.

Q. Did you have any short yearlings in your Wyoming bunch? A. No sir.

(Testimony of Bert Ruud.)

Q. You heard the testimony of Mr. Robertson about this paint that you put on them. This paint brand?

A. Yes sir.

Q. Tell us how you branded these cattle with the paint brand?

A. When I bought these cattle I had to leave them in the vicinity there for some time, and that demanded that I put some kind of mark on them until I assembled them in the feed lot, and I had to trail them through other cattle and so I had a man at the gate and as I brought them out he would dob them with a beer bottle or a stick.

Q. Where were they branded?

A. On the hip mostly.

Q. With a beer bottle or stick?

A. Well, we used a bottle mostly but we broke the bottle a couple of times. [139]

Q. I understand this was green paint?

A. Green mostly, that is the only kind I had.

Q. How long would that paint remain on the cattle?

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. It stays on quite well, the paint would stay two or three months if there wasn't too much storm. It would wash off with the weather.

Q. Was that the brand you referred to when you wrote O left hip in your contract?

Judge Baum: Objected to as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written instrument.

(Testimony of Bert Ruud.)

The Court: Overruled.

Q. Why did you put in this O brand on left hip, in the contract?

A. It was agreed with Mr. Salerno that we had to have some identification. I put the brand so he could identify them by that brand after they had been dehorned.

Q. Now, were any of the Wyoming steers horned?

A. Very few, now and again one had been overlooked there was two or three large steers with horns on them.

Q. Now, Mr. Ruud, why didn't you get the cattle which you intended to make the subject matter of this contract?

Judge Baum: Objected to as incompetent, [140] irrelevant and immaterial.

The Court: Sustained unless you are going to show an impossibility of fulfilling this contract.

Mr. Ruud, at the time this contract was delivered to you for your signature, November 4, were you paid the sum of \$3,000.00 mentioned in the contract? A. No sir.

Q. Did you receive any money from the plaintiff later on? A. Yes sir.

Q. How was that money paid to you?

A. It was left by check by Mr. Salerno at the hotel for me to pick up.

Q. What was that paid on, was it on this contract?

(Testimony of Bert Ruud.)

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The check recited that it was for cattle that I was—

Judge Baum: I think that can be answered yes, or no, read the question to the witness Mr. Reporter.

(Question read.)

A. No sir.

Q. Does that check represent or evidence payment you received from the plaintiff in 1946?

A. Yes sir.

Q. What is the date of that? [141]

A. November 29, 1946.

Q. About when did you receive that check?

A. I think about the 7th or 8th of December.

Q. Did you make any alterations in the check after you received it?

Judge Baum: I think I object at this time upon the ground that this line of questioning now appears irrelevant and immaterial. The witness stated that the check he is holding was not paid under this contract, if it wasn't paid under the contract then I fail to see the materiality at all.

The Court: Overruled.

A. No sir.

Q. Is that the only money you received in the Fall of 1946 or the year 1947 from the plaintiff corporation?

A. Yes sir.

Mr. Albaugh: We now offer in evidence exhibit 16.

(Testimony of Bert Ruud.)

Judge Baum: Objected upon the sole ground that the witness has indicated that it wasn't a payment under this contract. No, I will **withdraw my objection** and the exhibit may be received without objection for what it is worth.

The Court: It is admitted.

Q. Did you ever receive any consideration, either money or otherwise for the execution of this contract? [142]

Judge Baum: Objected to as incompetent, irrelevant and immaterial, also seeking to vary the terms of the written contract.

Mr. Albaugh: One can always show consideration.

The Court: He may answer.

A. No sir.

Q. Now, Mr. Ruud, I believe you stated that you received this check about the 7th or 8th of December and this contract was signed November 4. What happened during the month of November concerning this contract?

A. I was trying to buy steers to fill it.

Q. Did you get those steers?

Judge Baum: Objected to as immaterial, irrelevant and incompetent.

The Court: What steers do you refer to counsel?

Mr. Albaugh: To fill the contract in question here.

The Court: Objection sustained.

Q. What was this check exhibit 16 given to you for?

(Testimony of Bert Ruud.)

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: It isn't clear to the Court what it was given for, he may answer.

A. I agreed to accept it and try to purchase cattle because [143] we had not filled the three hundred head as agreed in the contract, it was agreed that it would be between two and three hundred head.

Mr. Olmstead: I would rather have the conversation if there was one, and I move to strike this answer.

The Court: It may be stricken.

Q. Did you have any conversation with any representative of the plaintiff corporation during the month of November 1946 concerning the purchase of cattle? A. Yes sir.

Q. With whom was that?

A. Mr. Salerno.

Q. Where did your first conversation take place after November the 4th?

Mr. Olmstead: We object unless it relates to the cattle involved in this contract.

The Court: Unless it was another contract that was to be substituted for this one.

Mr. Olmstead: If they agree that the contract was modified but I don't think they do.

Mr. Albaugh: We contend that both parties abandoned this contract.

The Court: You seem to plead a new contract, a parole contract. **Overruled. [144]**

(Testimony of Bert Ruud.)

Q. Where was the conversation?

A. At Idaho Falls.

Q. Where in Idaho Falls?

A. At the Bonneville—no, at the Rogers Hotel.

Q. Who was present?

A. Mr. Salerno and myself.

Q. Relate what was said?

A. It was getting late in the Fall, feeder steers had quit running—

Q. —When did this conversation take place, what day of the month was it?

A. Around the last week in November. We had a conversation in regard to the purchase of the cattle. It was getting late in the Fall and I had fell down on getting two or three bunches. He knew that I agreed to accept this check and try to purchase cattle, it was agreed—

Mr. Albaugh: I will try to get the conversation.

Q. Mr. Ruud, just tell us what was said.

The Court: What was said by Mr. Salerno and yourself, Mr. Ruud. You were at Idaho Falls the last week in November, now go on from there.

A. I had not purchased the steers referred to in the contract. We had not received them and couldn't brand them. We talked the matter over. The run for feeders was getting slack, they only run in the months of October or November. Toward the latter end of November they are hard to get. [145] I agreed to take this check.

The Court: Tell us what was said, not what you agreed to do.

(Testimony of Bert Ruud.)

A. Mr. Salerno said "I will make you out a check" and I said "I will be able to get two or three hundred steers" and he said "shall I make it for two thousand or three thousand", I said "You can suit yourself, we might get two or three hundred" and he said "I will leave the check for you". I didn't see it until I picked it up and it said on the check 240 or more. When I talked to him again he said, "Did you get the check" and I said "I got the check" and I told him when I got the cattle he could come in and dehorn them and we would brand them, the same as on the old contract. That is the reason the check was altered in that manner.

Q. You deposited the draft did you?

A. Yes sir.

Q. And sent it through?

A. Yes, it laid in the bank and never was used, there was no purchase under that.

Q. Was it difficult that later, December 4, 5 or 6th, to obtain feeder cattle?

Judge Baum: We object, that is immaterial whether it was difficult or not.

The Court: Sustained. [146]

Q. In that section of the country, including Eastern Montana and Western Wyoming, are cattle bought for feeding?

A. During the months of September, October and November, yes.

Q. Before you received this draft which is exhibit 16, had the plaintiff corporation offered you any check before that time?

A. No sir.

(Testimony of Bert Ruud.)

Q. In your letter which is exhibit 2, accompanying the contract when you mailed it back to the plaintiff corporation on November 3rd or 4th, you demanded a change in the contract to eliminate the three per cent shrink. What was done in regard to that matter; did the company ever agree to waive the three per cent shrink? A. No sir.

Q. Did you ever agree to waive that demand?

A. No sir.

Q. When you took this draft for 240 or more head of steers was there anything said at that time in that conversation with Mr. Salerno about the price they were to pay for these cattle, or anything about the three per cent shrink?

A. The original deal was 17½ cents live weight and they broke it down on a dead weight deal that I didn't understand, and when I accepted this check it was agreed that the contract would be 17½ cents delivered at Ogden and no other way.

Q. Live weight?

A. Yes sir, that was the deal as it started out; they drew the contract the other way.

Q. Did you ever sell cattle before on a dressed weight basis? A. No sir.

Judge Baum: Objected to as immaterial.

The Court: Sustained.

Q. Did you discuss this three per cent shrink at that time. The conversation with Mr. Salerno at the time he said he would leave a check for you?

(Testimony of Bert Ruud.)

A. The only thing that was mentioned was 17½ cents. He said, "I always buy your cattle and I always pay for them and I will see that you get 17½."

Q. How long after that was it he left the draft?

A. I picked it up about a week after that.

Q. Where did you get it?

A. At my hotel box.

Q. Where? A. At the Rogers Hotel.

Q. At Idaho Falls? A. Yes sir.

Q. After that time did you buy any cattle for the plaintiff corporation or not—under any contract?

A. No sir.

Q. Why didn't you? [148]

Judge Baum: Objected to as immaterial.

The Court: It is immaterial. Objection sustained.

Q. Now, did Mr. Salerno come to your ranch in August 1947? A. Yes sir.

Q. Did you have a conversation with him there?

A. Yes sir.

The Court: When was this?

A. August 1947.

Q. When did you have the first conversation with Mr. Salerno in August 1947?

A. I cannot state the exact date but I remember him meeting me on the road at Grey's River.

Q. Who was present?

A. His wife was in the car I was getting some gas for my car at the service station and he walked over there, just him and me.

(Testimony of Bert Ruud.)

Q. What was said?

A. He said he saw some steers from my ranch at Idaho Falls.

Q. Pardon me, what did you say?

A. He said he saw some steers at Idaho Falls, from my ranch he said he saw them in the sale there and he said, "I am going to hold those steers" I said "How are you going to hold them, have you any identification to hold them" he said "yes I have," and at that he drove away. I didn't [149] see him for two or three days, maybe a week. I was notified by the stockyard that the payment was held up and I went to the brand inspector to find out why and he said there was no bill of sale to cover them and he said the Ogden Packing Company were holding the cattle.

Judge Baum: That is objected to as hearsay.

The Court: Wasn't this gone into in your case? I think it was and I think defendant is entitled to go into this. By the brand inspector I presume he means this gentleman back here.

Judge Baum: I assume so.

Q. When did you see Mr. Salerno again?

A. He came to the ranch again, I think the fore part of September, it may have still been in August.

Q. Would you say it was about the first of September?

A. Yes sir, the first of September or the last of August.

Q. Did you have a conversation with him at that time?

A. Yes sir.

(Testimony of Bert Ruud.)

Q. Who was present?

A. His wife was with him again. He drove in in his car.

Q. Where did the conversation take place?

A. On my field there.

Q. Relate that conversation as fully as you can, what was said by each of you?

A. He walked over to where I was irrigating and I invited [150] him to drive into the yard and we would talk the matter over that he came to see me about. He drove in front of my house and I took off the boots that I had on and we started to talk about the contract and the cattle.

Q. What was said?

A. He wanted to make some kind of demand on delivery and I said, "Is there any way we can take these cattle on the contract," and he said, "I don't want to take these cattle, I don't want to look at them."

Q. Now, what cattle are you talking about?

A. That I had on the ranch. I was trying to accommodate them and let them have the cattle at the same price.

Q. Will you just state what was said Mr. Ruud, not what you were trying to do.

A. There was an argument.

Q. What about?

A. The quality of the steers. These cattle were a heavy cattle and the cattle we agreed on the contract was to be light cattle.

Q. Did you discuss that?

A. Yes sir.

(Testimony of Bert Ruud.)

Q. What was said about the heavy and light cattle?

A. I try to give the conversation but it is hard to do. I tried at that time to get him on a horse and go to look at the cattle and talk about them and he refused to go. [151]

Q. Did he ever go and look at them?

A. No sir.

Q. Now, what was said and done there, just go ahead with the conversation?

A. He said according to that contract I have got to deliver three hundred head of steers branded with O on the left hip and I argued that the contract didn't say so and he said, "Well I am making demand for three hundred cattle," and I said, "I will get the contract and we will read it." I said, "What kind of cattle does that say?", and he said "steers" and I said, "I will go to Denver and buy you three hundred steers and sell them to you for 17 $\frac{1}{4}$ cents," and he said, "What kind of steers," and I said, "Steers as called for in the contract and will sell them for 17 $\frac{1}{2}$."

The Court: What contract was that?

A. The contract we had there. I thought that it was cancelled but he insisted on this. He said, "I don't think we can use that many steers, what kind will they be?", and I said, "They will be steers," he said, "I don't think we can use that many steers," and that was the substance of the conversation.

Q. Did he ask you to deliver those cattle on the ranch?

A. No sir.

(Testimony of Bert Ruud.)

Q. Did he say anything about them?

A. Never. [152]

Q. You asked him to go and look at them, what was his reply to that?

A. He said he didn't want to see them.

Q. Did he say why?

A. No sir. When he came to see me the first time my wife offered to show him the cattle and he refused to see them.

The Court: Were you there?

A. No, he was waiting to see me and my wife thought perhaps he wanted to see the cattle.

The Court: Never mind that part of it, what your wife did.

Q. In this conversation was there some arrangement for you to go to Afton, Wyoming and for him to call you later? A. That was after.

Q. When did that conversation take place?

Q. He came back after I had written a letter.

Q. What was that conversation where you agreed to meet him in Afton, or to talk to him?

A. Two or three weeks later, about the last week in September.

Q. What was said at that time?

A. We talked along the same lines, I tried to make some sort of a deal with the cattle we had on the ranch.

Q. Why?

A. As an accommodation, to try to settle this thing so that everybody would be friendly. [153]

(Testimony of Bert Ruud.)

Q. Did Mr. Salerno contend at that time that these cattle were cattle that you should deliver under the contract? A. No sir, he did not.

Judge Baum: I object to that as leading.

The Court: Reframe your question.

Q. Did Mr. Salerno at any time or anywhere in the Summer or Fall of 1947 ever demand that you deliver the cattle that you had on your ranch to the plaintiff corporation? A. No sir.

Q. Did he ever go and look at them?

A. No sir.

Q. At any time? A. No sir.

Q. How many times did you offer to show them to him?

A. I think three times, perhaps four.

Q. Did he state why?

A. One time he said on account of the weight.

Q. Did he say they were too light or too heavy?

A. Too heavy.

Q. When did he make that statement?

Judge Baum: I think that has been covered.

The Court: Overruled.

A. On the first visit.

Q. Tell us where this other conversation took place in which you agreed to go to Afton to telephone the plaintiff? A. On my ranch. [154]

Q. Who was present?

A. Louie and myself.

Q. Fix the date?

A. Along the last part of September.

Q. State what was said at that time?

A. I told him I had written to the house and

(Testimony of Bert Ruud.)

in answer to my letter they demanded 300 cattle or else. I wrote them I would buy three hundred head and I am repeating to you that I will buy three hundred head and he said, "I will go back to Ogden and then call you," and I said, "What time?", and he said, "At 10 o'clock Monday," and I said, "I will be there." I went to Afton the following Monday and about 11:30 I got a call and he said, "We decided that we can't use those cattle." I said, "Can you use these others?", and he said, "No." I said, "I have tried to satisfy you," and I said, "I am going to sell these cattle," and I did so and that was the last of the deal until they filed this suit and I talked to you about the matter and employed you at that time.

Q. Now, did you return to the plaintiff corporation \$3135.00 in the month of September 1947?

A. I think you did that.

Q. To refresh your recollection, it was your check was it not?

A. Yes, I took it to you and you figured the interest and you mailed it with your letter. [155]

Q. It was your check?

A. Yes sir, I still have the check.

Q. They returned the check? A. Yes sir.

The Court: We will take a ten minute recess.

11:35 a.m., May 26, 1948

Q. Are you acquainted with **Mr. Robertson** who testified here yesterday? A. Yes sir.

Q. Did he work for you in Jackson Hole for a while in the Fall of 1946? A. Yes sir.

(Testimony of Bert Ruud.)

Q. Do you remember when you employed him?

A. Yes, I think it was the first week of November. I think I employed him in October and I think he had to leave and then he came back either the last of October or the first of November.

Q. Did you at any time ever make a statement to Mr. Robertson that these cattle you had in Jackson were under contract? A. No sir.

Q. Were they under contract? A. No sir.

Q. Did you discharge Mr. Robertson?

A. Yes sir.

Q. Do you ordinarily tell your hired hands about your business affairs? [156]

Judge Baum: Objected to as immaterial.

The Court: Sustained. The only important matter here is whether he told him at that time.

Mr. Albaugh: At this time, if the Court please, we desire to make **an offer of proof**. We offer to prove by this witness that at the time this contract was entered into or signed. At the time it was negotiated with Mr. Salerno, immediately prior to the signing of the contract that the defendant did not have three hundred head of steers or any number whatever, on his ranch, and did not own any steers which were the subject matter of this contract; that it was understood and agreed between the plaintiff corporation by and through their agent Mr. Salerno that the contract would not take effect until Mr. Ruud had purchased the steers which would be the subject matter of the contract

and that the contract was delivered conditionally upon his obtaining such steers to be the subject matter of the contract, that the steers were never obtained and the subject matter of the contract was never in existence and that the contract was never delivered and never became effective.

The Court: What do you mean by that statement, "never was delivered"?

Mr. Albaugh: No legal delivery, I am distinguishing between manual and legal delivery.

Mr. Olmstead: That is objected to for the reason that the proffered evidence is immaterial, incompetent and irrelevant and it seeks to vary the terms of a written agreement.

The Court: The offer of proof is denied.

Mr. Albaugh: That is all.

Mr. Olmstead: I think there is no cross-examination.

Mr. Albaugh: The defense rests.

Mr. Olmstead: No, I think not, however, we may have one short witness.

The Court: We will recess until 1:30.

1:30 p. m. May 26, 1948

Mr. Olmstead: The plaintiff rests.

The Court: There is one exhibit I excluded on yesterday.

Mr. Albaugh: Exhibit 15 I think is the only one excluded.

The Court: I think I will reverse my ruling and admit it for what it may be worth.

DEFENDANT'S EXHIBIT No. 15

Ogden, Ut., Nov. 15, 1946.

Bert Ruud,

Irwin, Ida.

Dear Sir.

I have your letter of Nov 3 and I am sorry you did not understand the 3% shrink as we shrink all of our kill and I thought you would understand this.

If you will check with other Packers I am sure you will find that they figure their cattle the same way.

As to the 29.66 for a 59 yield. If they yield more you will get paid for all over 59% as we will deduct for all under 59%.

The 3% shrink on hot weights will have to remain in the contract or I can not buy these cattle.

If you want to go through with this contract please write me and we will mail you a check.

Yours Truly

/s/ LOUIS SALERNO.

(Statement of Court and counsel as to filing of briefs.)

The above is all the evidence and proceedings had in and about the trial of the above cause. [158]

State of Idaho,

County of Ada—ss.

I. G. C. Vaughan, hereby certify that I am the duly appointed Official Court Reporter for the United States District Court, in and for the District of Idaho; I further certify that I took the evidence and proceedings in the above entitled cause in shorthand and thereafter transcribed the same

(Testimony of Bert Ruud.)

into longhand (typewriting) and that the foregoing pages 4 to 146 is a true and correct transcript of the proceedings had and the evidence given in the trial of the above entitled cause.

In witness whereof I have hereunto set my hand this 5th day of July, 1948.

/s/ G. C. VAUGHAN,

Reporter.

[Endorsed]: Filed Nov. 12, 1948. [159]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Healy, District Judge

I am of opinion that the written contract was a binding agreement, unconditionally delivered, or if its delivery was conditional that the condition was waived. The defendant breached it in its entirety and plaintiff is entitled to damages measured by the difference between the contract price and the market price at Ogden as of the time the property should have been delivered. There was no mutual abandonment of the contract; but as will presently be seen I am of the belief that there was a subsequent parol modification or partial rescission of it designed to relieve the defendant of his obligation to deliver the full number of steers contracted for.

I do not regard defendant's letter of November 3, 1946, as sufficiently evidencing a conditional delivery of the contract. I think it was intended as

no more than an expression of a desire for the elimination of the provision relative to the 3% shrink. Defendant's conduct in signing and returning the offered contract, plus his request that plaintiff also sign it and mail him a check, is powerful evidence of an unconditional delivery. In any event, the later acceptance of the \$3,000 payment, which was undoubtedly made and received as a payment on the written contract, would establish a waiver of the condition. Beyond that, the defendant subsequently regarded the contract as being in effect, as is shown in his letters of August 22nd and 28th, 1947.

Defendant did not offer to perform the contract, as he claims. In this and in all other phases I place no credence whatever in his testimony. Only in particulars in [160] which it is fully corroborated by other evidence do I regard it as worthy of belief. Defendant reneged on his engagement for the obvious reason that it was to his advantage to do so. The plaintiff fully performed the obligations on its part.

There can be no question but that the 218 head of steers shown to be on feed in Wyoming in November, 1946, were the steers referred to in defendant's letter of November 3. These animals then bore the "O" brand on the left hip. They constituted, pro tanto, the steers with which defendant expected to fulfill his contract. Whether defendant had any additional steers is not shown, but he probably had not. The cost of acquiring them advanced steadily after that time, as he says. This

brings us to a consideration of Defendant's Exhibit 16, being the draft for \$3,000 dated November 29, 1946, and cashed by the defendant ten days later. The reference in the attached so-called bill of sale to "240 or more" head of steers creates an ambiguity in the proof that I have found it difficult to resolve. The witness Salerno could have clarified this ambiguous document if he had been asked about it, but no inquiry on the subject was made of him. Defendant was plainly not happy about the 3% shrink, and he was doubtless currently complaining to Salerno of the difficulty of getting steers at prices he had expected to pay. This latter I gather from his testimony. Salerno, while claiming that he had not seen the defendant during this period, admitted that he had talked with him on the telephone.

Reading between the lines, and endeavoring to give due weight to this important exhibit, I am of the belief that Salerno agreed orally to relieve the defendant of his obligation to deliver the full number of steers contracted for and undertook on behalf of his principal to reduce the number to not less than 240 head. See Restatement of the Law of Contracts, Par. 408. In view of its failure to interrogate [161] Salerno, I am inclined to resolve against the plaintiff doubts concerning Salerno's authority, concerning plaintiff's ratification of his act, and also questions relative to consideration for the modification, or the effect, if any, of defendant's subsequent failure to perform. My conclusion is that as regards the number of steers required to

be delivered under the terms of the written contract the defendant was absolved of his obligation to the extent indicated in the exhibit. There is no credible evidence of a rescission or modification of any other term of the written agreement.

Plaintiff should be required only to prove its damages with such degree of certainty as the circumstances permit. The business in which plaintiff was engaged and the purpose for which it wanted the steers were well known to the defendant who was himself an experienced dealer in beef cattle. Both parties were familiar with the usages of the trade. The contract, as construed by the defendant himself, contemplated steers of good quality. The quality of those defendant had on feed at the time is strongly corroborative of this interpretation. It is to be gathered from the contract that the steers, when delivered, were to be suitable for present slaughter, that is, they were not to be what is commonly referred to as feeder steers.

The chief difficulty on this phase is as to the weight. It is true that the 218 head above referred to were shown on their sale the following August to weigh well over 1,000 pounds. However, title to them had not passed, they were not legally dedicated to the contract, and the defendant was free to substitute other steers of good quality. I think on all the evidence a fair, perhaps minimum, finding as to average weight would be 950 pounds. The contract price, live weight, was 17½ cents per pound. There is competent [162] evidence that the going market price at Ogden for good quality

steers suitable for slaughter at the time specified for delivery, was not less than 25 cents. Using the difference between these two figures and assuming a weight of 950 pounds, the damage per steer would be \$71.25, and for 240 steers would be \$17,100. Plaintiff is entitled to judgment for this amount plus the sum of \$3,000 advanced on the contract price. Presumably it is entitled to interest on the latter sum from the date of payment of *payment*. Judgment will be given accordingly.

Counsel for the plaintiff should prepare and submit findings of fact and conclusions of law. Opportunity will be given opposing counsel to make objections to these findings or to propose others.

[Endorsed]: Filed Oct. 4, 1948. [163]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for trial on the 25th and 26th days of May, 1948, before the above Court sitting without a jury, the Honorable William Healy, United States Circuit Judge for the Ninth Circuit, presiding, upon the complaint of the plaintiff and the amended answer of the defendant, the plaintiff being present in Court and represented by its counsel, and the defendant being present in Court and represented by his counsel, and evidence, both oral and documentary, having been offered by the respective parties, and both parties having rested their respective cases, and the matter having

been submitted to the Court for decision, and the Court being fully advised in the premises, now makes the following

FINDINGS OF FACT

I.

That the plaintiff is, and has been for many years past, a citizen of the State of Utah, being a corporation duly organized and existing thereunder, with its principal place of business at Ogden, Utah, and is, and has been for many years, qualified to do and doing business in the State of Idaho; that the defendant is a citizen and resident of Bonneville County, Idaho. That the matter is controversy between the parties exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That plaintiff is, and has been for many years, engaged in carrying on a general livestock slaughtering and [164] meat packing business, with its principal slaughtering and processing plant at Ogden, Utah. That the defendant is, and has been for many years, engaged in carrying on a general ranching business near Irwin, Bonneville County, Idaho, and engaged in raising, feeding, buying and selling livestock for commercial purposes.

III.

That on the 4th day of November, 1946, plaintiff and defendant made and entered into and delivered a contract in writing as follows:

“This Agreement, made this 4 day of November, 1946, by and between Bert Ruud of Irwin, Idaho,

hereinafter called the Sellar, and American Packing & Provision Co. of Ogden, Utah, hereinafter called the Buyer,

Witnesseth:

Whereas, the Sellar is the owner of certain steers now held upon Seller's ranch near Irwin, Idaho, which said steers are branded O L Hip; and,

Whereas, the Buyer desires to purchase three hundred (300) head of said steers upon terms and conditions mutually agreed upon, which terms and conditions are hereinafter set out;

Now, Therefore, it is hereby mutually agreed between the parties hereto as follows:

(1) The Sellar hereby agrees to sell and deliver to the Buyer, and the Buyer hereby agrees to purchase from the Sellar three hundred (300) head of the steers hereinbefore described.

(2) The Buyer herewith pays to the Sellar, receipt of which by the Sellar is hereby acknowledged the sum of Three Thousand (\$3,000.00) Dollars, as partial payment upon the purchase price of said steers, the full amount of which purchase price is to be determined at the times and in the manner set out in Paragraph 4 hereof.

(3) The Sellar agrees at his sole expense to continue to care for and feed said steers in accordance with good ranching practice on his ranch near Irwin, Idaho, until called for by the Buyer as hereinafter provided, and to dehorn the same at his own expense at the proper dehorning time, and to deliver the same to the Buyer as hereinafter provided, free and clear of all liens and encumbrances

of every kind and character. Sellar's operations in connection with his caring for, feeding, and for de-horning said cattle shall [165] be subject to Buyer's inspection at any and all times, but Buyer assumes no responsibility in connection therewith.

(4) As and when called for by the Buyer, which shall be during the period from August 1, 1947, to October 1, 1947, the Sellar agrees at his sole expense to deliver said three hundred (300) steers, and all of them, to the Buyer, F.O.B. Ogden, Utah. When delivered to the Buyer as aforesaid, the off car live weight of the same shall be determined, and thereafter the same shall be slaughtered by the Buyer as soon as is reasonably possible in the orderly conduct of Buyer's business (the Buyer to be the sole judge thereof). Following the slaughter of the same they shall be graded in accordance with U. S. Department of Agriculture standards, and the dressed weight yield thereof, using approved packing house methods in determining the same, and by shrinking the warm weight three (3%) per cent, shall be ascertained, and the Buyer shall pay the Sellar therefor at a price based on the dressed weight in accordance with which ever of the following formulas may be applicable:

A. For Those That Grade "A":

For all of said steers that grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Sellar as the full purchase price therefor, upon the basis of the total dressed weight thereof at the rate of 29.66 cents per pound dressed weight.

B. For Those That Grade in Excess of Grade "A":

For all of said steers that grade in excess of Grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Seller, as the full purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, plus the then difference in Buyer's market price per pound dressed weight between grade "A" steers and the Grade of such steers. For example: If at the time of slaughter, the Buyer's then market price for grade "AA" steers is two (2) cents a pound dressed weight higher than for grade "A" steers, the Buyer shall pay the Seller for the "AA" steers 29.66 cents, plus 2 cents, or a total of 31.66 cents per pound, dressed weight.

C. For Those That Grade Less Than Grade "A":

For all of said steers that grade less than Grade "A" in accordance with the foregoing standards, the Buyer shall pay the Seller, as the purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, less the then difference in Buyer's market price per pound dressed weight between grade "A" steers, and the grade of such steers. For example: If at the time of slaughter the Buyer's then market price for grade "B" steers is two (2) cents a pound dressed weight less than for grade "A" steers, the Buyer shall pay the Seller for grade "B" steers 29.66 cents, less two cents (2), or a total of 27.66 cents per pound, dressed weight. [166]

(5) It is understood that the Seller at this time has steers of the same type as those preferred to

herein in excess of the 300 hereby sold to the Buyer, and the Sellar hereby guarantees delivery to the Buyer of the full count of 300 head, without any reservation, express or implied.

(6) Title to the aforesaid steers is to remain in the Sellar until delivered to the Buyer as herein provided, and until so delivered they are held by the sellor at his sole and exclusive risk and expense.

In Witness Whereof, the parties have hereunto set their hands this 4th day of November, 1946.

/s/ BERT RUUD,

Sellor.

AMERICAN PACKING &
PROVISION CO.,

By /s/ E. W. FALLENTINE,

Its Vice-President.

Buyer.”

IV.

That thereafter and on or about November 29, 1946, the said contract was modified to the extent of changing the number of steers covered thereby from 300 steers to 240 or more steers.

V.

That the type of steers covered by said contract were steers of good quality and suitable for slaughter upon delivery.

VI.

That plaintiff duly performed all of the conditions, stipulations and agreements on its part to be performed.

VII.

That on or about August 26, 1947, and within the time so provided in said contract, plaintiff de-

manded of defendant delivery to it of the steers covered by the contract, such delivery to be made on or before September 3, 1947. [167]

VIII.

That defendant without legal cause failed and refused to deliver to the plaintiff the steers covered by the contract, or any of them, at the time he ought to have delivered them as provided by the contract, or at all.

IX.

That the average weight of the steers covered by the contract as of the time delivery should have been made was 950 pounds each.

X.

That the time plaintiff was entitled to delivery of the steers covered by the contract there was an available market at Ogden, Utah for such steers.

XI.

That the contract price of the steers covered by the contract was 17.5 cents per pound live weight.

XII.

That the market price of the steers covered by the contract at the **time defendant ought to have** delivered them to plaintiff at Ogden, Utah, was 25 cents per pound, live weight.

XIII.

That plaintiff paid to defendant on account of the purchase price of the steers covered by the contract the \$3,000.00 mentioned in paragraph 2 of this contract.

XIV

That except as modified as to the number of steers covered by the contract from 300 steers to 240 or more, the contract was at all times, from the date of the execution and delivery thereof by the parties, a valid and binding contract.

XV.

That said contract was not conditionally delivered, not did any conditions, either conditions precedent or conditions subsequent, attach to its delivery. [168]

XVI.

That there was no failure of consideration, either partial or total, insofar as the contract was concerned.

XVII.

That said contract was never rescinded or abandoned.

XVIII.

That except to modify the contract as to the number of steers covered thereby from 300 to 240 or more, no new or additional contract or agreement was made which affected in any way the obligations of the parties as set forth in such contract.

XIX.

That subsequent to the time defendant ought to have delivered to plaintiff the steers covered by the contract, defendant offered to return the \$3,000.00 previously paid by plaintiff under the contract, but plaintiff refused to accept the same.

XX.

That defendant never made an offer to fulfill his obligations under the contract.

XXI.

That the defendant asserts that the contract was conditionally delivered. The Court has hereinbefore found that the contract was not conditionally delivered, but the Court further finds that even if any conditions were attached by the defendant to the delivery of the contract, such conditions were waived by him.

XXII.

That the difference between the contract price of 17.5 cents per pound live weight for the steers covered by the contract and the market price of said steers at the time and place delivery ought to have been made of 25 cents per pound live weight, namely, 7.5 cents per pound live weight, was and is the basis of plaintiff's damages. [169]

XXIII.

That upon such basis, plaintiff's damages for each of the 240 steers of an average weight of 950 pounds which defendant should have delivered, but didn't deliver, was \$71.25 per steer, and a total of \$17,100.00 for the 240 steers.

And the Court having made the foregoing Findings of Fact now reaches the following

CONCLUSIONS OF LAW

1. That plaintiff is entitled to judgment against the defendant for \$17,100.00 damages for defendant's breach of the contract.

2. That plaintiff is entitled to judgment for \$3,000.00 paid by it as a part of the purchase price for the steers covered by the contract.

3. That plaintiff is entitled to judgment for interest on said sum of \$3,000.00 at the legal rate of 6% per annum from September 3, 1947.

4. That plaintiff is entitled to judgment for its costs.

Let Judgment Be Entered Accordingly.

Dated this 1st day of November, 1948.

WILLIAM HEALY,
Judge.

[Endorsed]: Filed Nov. 3, 1948. [170]

In the United States Court for the District
of Idaho, Eastern Division

No. 1464

AMERICAN PACKING & PROVISION CO., a
Corporation,

Plaintiff,

vs.

BERT RUUD,

Defendant.

JUDGMENT

Filed November 3, 1948

This matter came on regularly for trial on the 25th and 26th days of May, 1948, before the above Court, sitting without a jury, the Honorable William Healy, United States Circuit Judge for the Ninth Circuit, presiding, upon the complaint of the plaintiff and the amended answer of the defendant, the plaintiff being present in Court and represented by its counsel, and the defendant being present in Court and represented by his counsel, and evidence, both oral and documentary, having been offered by the respective parties, and both parties having rested their respective cases, and the matter having been submitted to the Court for decision, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law wherein the facts found and the conclusions reached are separately stated;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover judg-

ment from the defendant for the sum of \$20,100.00, together with interest on \$3,000.00 thereof at the rate of six percent (6%) per annum from September 3, 1947, in the amount of \$212.50, making a total judgment of \$20,312.50.

It Is Further Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant for its costs assessed in the amount of \$375.99.

Dated this 1st day of November, 1948.

WILLIAM HEALY.

United States Circuit Judge.

Entered in Civil docket Nov. 3, 1948.

[Endorsed]: Filed Nov. 3, 1948. [171]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that Bert Ruud, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 3, 1948.

Dated November 5, 1948.

ALBAUGH, BLOEM,
HILLMAN & BARNARD,
Attorneys for Defendant-
Appellant,

[Endorsed]: Filed Nov. 12, 1948. [172]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
 2. Amended answer.
 3. The entire transcript of the evidence, copy of which is on file with the court.
 4. Findings of fact and conclusions of law.
 5. Judgment
 6. Notice of Appeal
 7. This designation.
- Dated November 19, 1948.

ALBAUGH, BLOEM,
HILLMAN & BARNARD,
Attorneys for Appellant.

[Endorsed]: Filed Nov. 22, 1948. [173]

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 173, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary

to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of \$17.40, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of December, 1948.

(Seal) /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 12135. United States Court of Appeals for the Ninth Circuit. Bert Ruud, Appellant, vs. American Packing & Provision Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed December 20, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United Ctates Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12135

AMERICAN PACKING AND PROVISION CO.,
a corporation,

Plaintiff-Respondent,

vs.

BERT RUUD,

Defendant-Appellant.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in making its Finding of Fact V, for the reason that the written contract in suit, described in Finding of Fact III does not require the delivery of "good quality" steers, and there is no competent evidence to support any finding to that effect, and the effect of such finding is to vary and add to the terms of a written contract.

2. The Court erred in overruling appellant's objections to testimony relative to quality of steers claimed to have been intended under the contract, for the reason that such testimony was incompetent, irrelevant and immaterial, and tended to vary and add to the terms of a written instrument.

3. The Court erred in making Finding of Fact IX, for the reason that there is not sufficient competent evidence to support the same, said Finding in legal effect varies and adds to the terms of a written instrument, and all the evidence as to probable weight of cattle at the time delivery was de-

manded was based on mere speculation and conjecture.

4. The Court erred in overruling appellant's objections to questions asked the witness Bert Ruud as to what he estimated the steers he intended to get would have weighed at the time delivery was demanded, for the reason that such testimony was incompetent, irrelevant and immaterial, the contract did not call for cattle of any particular weight, such testimony was necessarily based on mere speculation and conjecture, and tended to vary and add to the terms of a written instrument.

5. The Court erred in overruling appellant's objections to testimony concerning the weight and quality of certain cattle sold by appellant at Idaho Falls in the fall of 1947, and in the admission of Exhibits 5 and 6, sales records concerning same, for the reason that such testimony and exhibits were incompetent, irrelevant and immaterial, had no bearing on any of the issues of the case, and there is not sufficient evidence to show, or even tend to show, that such cattle were the cattle covered by the contract, and the evidence affirmatively shows that said cattle were not the contract cattle.

6. The Court erred in making its Findings of Fact XII and XXII, both concerned with the market price of steers on the Ogden market at the time delivery under the contract was demanded, for the reason that there is not sufficient evidence to support the same, and the evidence is contrary thereto, and the Court further erred in making Finding of Fact XXIII, to the effect that respondent did suf-

fer damages, the same being contrary to the evidence, and based upon mere speculation and conjecture.

7. The court erred in refusing to permit appellant to impeach the witness Louis Salerno by the use of his pre-trial deposition, under Rule 26 (d) (1).

8. The Court erred in denying appellant's offer of proof, in which appellant offered to prove by the witness Bert Ruud, that at the time the contract was negotiated with respondent's agent, Louis Salerno, immediately prior to the signing of the contract, the defendant did not have three hundred steers, or any other number whatever, on his ranch, and did not own any steers which would be the subject matter of the contract, that the contract was delivered conditionally upon his obtaining such steers to be the subject matter of the contract; that the steers were never obtained, and that the contract was never delivered and never became effective, for the reason that the court's ruling denying said offer of proof was contrary to law.

9. The Court erred in making Findings of Fact III, XV and XXI, all referring to the making and delivery of the contract in suit, to the effect that the contract was fully and unconditionally delivered, or, if conditionally delivered, the conditions were waived by appellant, for the reason that there is not sufficient evidence to support the same, and the evidence is contrary thereto, in that the evidence establishes that the contract was delivered by appellant subject to the condition precedent that the

contract was not to be in effect unless and until appellant obtained cattle to fill it, and to the further condition that certain provisions therein relating to an allowance of three per cent for shrinkage be eliminated, and the evidence discloses that these conditions were never met.

Further, said Findings in legal effect are inconsistent with Finding IV, to the effect that the original contract was modified.

10. The Court erred in making Findings of Fact IV, XIV, XVII and XVIII, to the effect that the original contract was modified only as to the number of steers to be delivered, for the reason that there is not sufficient evidence to support the same, and the same are contrary to the evidence, in that the evidence establishes that the original contract described in Finding III was abandoned by the parties by the substitution of a new and different agreement, which was in no sense only a modification of the original contract.

11. The Court erred in overruling appellant's motion to dismiss at the close of respondent's case.

12. The Court erred in making its Findings of Fact, VI, XIII, XVI, all to the effect that the plaintiff fully complied with the conditions, stipulations and agreements of said contract by paying the down payment required, and by reason thereof there was no failure of consideration, for the reason that said Findings are contrary to the evidence, in that the evidence establishes that the respondent never made the down payment called for by the terms of the original contract described in Finding III,

and the payment subsequently made by respondent shows on its face and by other evidence that it was made on another and different subsequent agreement.

13. The Court erred in making Findings of Fact VIII and XX, to the effect that appellant refused to perform the contract and did not offer to perform, for the reason that the same are not sustained by the evidence, and the uncontradicted evidence shows that appellant offered both orally and in writing to deliver steers to respondent to fill any obligation which might exist on his part.

/s/ ALBAUGH, BLOEM,
HILLMAN & BARNARD,
Attorneys for Appellant.

[Endorsed]: Filed January 10, 1948. Paul P. O'Brien, Clerk.

No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD,

Appellant

vs.

AMERICAN PACKING & PROVISION CO.,
a Corporation,

Appellee

Brief for Appellant

Appeal from the United States District Court for the
District of Idaho, Eastern Division

ALBAUGH, BLOEM, HILLMAN & BARNARD

Attorneys for Appellant

IDAHO FALLS, IDAHO

FILED

MAR 28 1949

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Brief for Appellant

STATEMENT OF THE PLEADINGS AND
JURISDICTION

Complaint

The complaint alleges that plaintiff is a citizen of Utah, being a corporation organized and existing therein. That defendant is a citizen of the State of Idaho. That the amount in controversy exceeds the sum of \$3,000.

That plaintiff is engaged in the meat packing business at Ogden, Utah, and that defendant is engaged in ranching, engaged in raising livestock for commercial purposes.

That on or about November 4, 1946, the parties entered into a contract for the sale, by defendant to respondent, of 300 steers, for delivery about ten months later.

That delivery was demanded on or about September 3, 1947, and that defendant failed, neglected and refused to deliver any steers to plaintiff, and plaintiff was thereby damaged in the sum of \$31,026.00, demand for which has been made and refused.

Amended Answer

The Amended Answer admits the citizenship and business of the parties, alleges that the contract was conditionally delivered and the conditions never met, that the original contract never became operative and was abandoned, and a new agreement made, that defendant offered to return the \$3,000 payment made on the substitute contract, but that such offer was refused, and that defendant offered to deliver steers as required by the contract, which offer was also refused.

Jurisdiction

This is a suit of a civil nature between citizens of different states, where the amount in controversy exceeds \$3,000, exclusive of interest and costs, and the United States District Court has jurisdiction under Title 28, Section 41 U. S. C. A. (Judicial Code, section 24, amended.)

The appeal is from a final judgment of the United States District Court for the Eastern District of Idaho. The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction under Title 28, U. S. C. A. (Judicial Code, section 128, amended).

STATEMENT OF THE CASE

This is an action for damages for breach of an alleged written contract.

Appellant is a cattle rancher, owning and operating a ranch near Irwin, Idaho, where he feeds and pastures cattle during the summer and fall months. (Rec., pp. 19, 20, 34, 140, 141). Respondent is a corporation engaged in a general meat packing business at Ogden, Utah. (Rec., p. 2.) One, Louis Salerno is its chief cattle buyer. (Rec., pp. 125, 126.)

Shortly prior to November 1, 1946, Salerno entered into negotiations with appellant for a contract under which appellant would deliver 300 head of steers to respondent about ten or twelve months later. (Rec., pp. 125-128, 21.) The negotiations resulted in a contract being drawn by respondent as instructed by Salerno and forwarded to appellant by mail. (Rec., pp. 127, 142.)

The contract recited that appellant had 300 head of steers on the ranch at Irwin, branded "O" on left hip, which he was to care for until delivery was demanded the following fall, title to pass at the time of delivery. (Rec., pp. 4-8).

Appellant did not have 300 steers, or any other number, on his ranch or any place else, which fact was fully known to Salerno (Rec., pp. 35, 127.) It was necessarily contemplated that appellant would have to acquire the steers on the market or from other ranchers. (Rec., p. 128.) Appellant's ranch was located in a heavy snow country and he and Salerno understood that the cattle would not actually be

placed on the ranch until the following spring, when pasture would be available. (Rec., pp. 127, 128.) In the meantime, they would have to be fed and cared for at some other place where feed was available. (Rec., p. 128.)

It appears in the record that appellant had in mind that he would procure the steers from various sources, that he expected to acquire most of them from Peterson Brothers, in the Big Hole Country, near Jackson, Montana, but that he was free to get them wherever he could. (Rec., pp. 146, 96, 111-114.)

The contract recited that respondent made a down payment of \$3,000 at the time of the execution of the contract, but this was not paid at that time, and the only payment which was made some weeks later recited that it was for 240 or more head of steers. (Ex. 16.)

Appellant signed the contract on or about November 3, 1946, and returned it to Salerno, but accompanied it with a letter, Exhibit 2, in which he stated that a provision in the contract for an allowance for shrinkage was not in accord with the previous oral negotiations, and he wanted this provision eliminated. (Ex. 2.)

Salerno and appellant then entered into further negotiations, by mail and also orally, and it appears in a letter written by Salerno under date of November 15th, Exhibit 15, that neither party then regarded the deal as closed, as Salerno stated in this letter that the shrinkage provision would have to remain and he asked if appellant wanted to go through with

the deal. The negotiations continued for several weeks, until about December 9th, when Salerno left a draft for \$3,000 at an Idaho Falls hotel for appellant to pick up. This draft was the only payment of any kind made by respondent, and as stated, it recited that it was down payment for 240 or more head. (Rec., pp. 148-151.)

The trial court found that the original contract had been merely modified and only to the extent of reducing the number of steers to be delivered. (Rec., p. 176.) It is appellant's claim that by undisputed testimony it was established that the original contract had been abandoned and the parties had arrived at an entirely different deal. (Rec., pp. 151-155, 102-103.) Appellant contends that the testimony establishes that in these negotiations subsequent to the signing of the original contract, Salerno was informed that appellant had not been able to get the steers he originally expected to get, and that it was agreed that he would accept the check and thereafter get as many steers as he could, which he expected would be 240 or more. (Rec., pp. 103, 151-155.) Appellant offered to prove that it was agreed there would be no deal unless he was able to get steers. (Rec. p. 162.) The court denied this offer of proof, and its ruling and also its finding that the original contract was merely modified are assigned as errors.

It is appellant's theory that both the original contract and the subsequent agreement in December were made on the express condition that unless and until appellant was able to get suitable steers, the

contract would not be in effect. (Rec., pp. 162-163.) The trial court refused to permit appellant to show these conditions precedent, and its rulings in this respect are assigned as error.

Appellant did not acquire any steers for the contract, his explanation being that it was too late in the season by the time the parties finally reached an agreement. (Rec., pp 152, 102,103.)

The original contract called for 300 head of steers, nothing being specified as to age, kind, size, or quality. It was in form a contract by which appellant presently sold 300 steers to respondent, delivery to be made several months later, but title was not to pass until delivery was made. The price was fixed on a dressed weight basis, and varried according to how the grade or quality varied. For those that graded "A", the price, converted from the dressed weight price stated in the contract, was to be 17½ cents per pound live weight. For those that graded above "A", the price was higher, and for those grading below "A", the price was lower, according to the formula specified. The contract did not specify that any particular number or percentage were to be of any particular grade. (Ex. 1.) The trial court found that under the contract, appellant was required to furnish "good quality" steers, and its ruling in this respect is assigned as error.

The contract provided that appellant's operations in connection with the feeding, caring for, and de-horning the steers, would be at all times subject to the respondent's inspection and to its satisfaction,

but neither Salerno nor any other representative of respondent ever made any inspection or gave any directions, or even called at appellant's ranch, until August, 1947, when demand was made for delivery. (Ex. 1 Rec., p. 104.) When demand was made, it was for the full 300 head as called for in the original contract. (Rec., p. 158, Ex. 7.)

The evidence shows that appellant offered both by letter and orally to obtain 300 steers on the market and deliver them to respondent, and that this offer was refused by respondent. (Rec., p. 158.) Although this evidence was not contradicted, the trial court entirely disregarded the same, and found that no offer to perform had been made by appellant. (Rec., p. 177.) This ruling is assigned as error.

During the month of November, 1946, appellant had 218 head of cattle which he was winter feeding near Jackson, Wyoming. (Rec., pp. 144-145.) He put these cattle on his ranch in the summer of 1947, and sold them on the market at Idaho Falls, commencing in August of that year. (Ex. 3 and 4.) They varied widely as to age, weight and size, ranging from about 800 to 1300 pounds. (Ex. 3 and 4.) A large amount of testimony was received over the objections of appellant concerning these cattle, particularly as to their weight and quality, the objections being to the effect that there was no showing, or even any claim, that these cattle had anything to do with the contract, (Rec., pp. 35-83.) The rulings of the trial court permitting this evidence are assign-

ed as error.

The trial court also admitted testimony, over appellant's objections, as to the weight and quality of steers appellant expected to get from a Montana ranch for the contract. (Rec., pp. 22-24.) These were cattle he thought he could procure at the time he and Salerno were first negotiating. (Rec., pp. 110-115.) The adverse rulings of the trial court are assigned as error, particularly as to what the witness estimated the average weight of these cattle would be at the time of delivery under the contract, about ten months later. Appellant believes that any such estimates would be necessarily founded on mere speculation and conjecture.

On the question of damages, the evidence showed that the market price of slaughter steers, at Ogden, at the time delivery was demanded, ranged from sixteen cents to twenty-six cents for slaughter steers. (Rec., pp. 87-89.) The trial court, ruling that the contract required the delivery of "good quality" steers, found that the market price for that kind of steers was twenty-five cents. (Rec., p. 175.) It also found that the average weight of steers which should have been delivered was 950 pounds. (Rec., p. 175.) These findings are assailed as erroneous.

Respondent did not call as a witness its agent who carried on the negotiations, Louis Salerno. In order to show what the parties did agree on after the original contract had been signed, appellant called him. (Rec. p. 125.) He was a hostile and unfriendly wit-

ness, and appellant sought to impeach his testimony by the use of his pre-trial deposition, but the court would not permit this to be done. (Rec., p. 129.) This ruling is assigned as error, under rule 26 (d) (1).

SPECIFICATION OF ERRORS

I

The Court erred in denying appellant's offer of proof, in which appellant offered to prove by the witness Bert Ruud, that at the time the contract was negotiated with plaintiff's agent, Louis Salerno, and immediately prior to the signing of the contract, the defendant did not have three hundred steers, or any other number whatever, on his ranch, and did not own any steers which were the subject matter of the contract; that it was understood and agreed between the plaintiff corporation, by and through said agent, Louis Salerno, that the contract did not take effect until defendant had purchased the steers which would be the subject matter of the contract, that the contract was delivered conditionally upon his obtaining such steers to be the subject matter of the contract; that the steers were never obtained and the subject matter of the contract was never in existence, and that the contract was never delivered and never became effective, for the reason that the court's ruling denying said offer of proof was contrary to law.

The offer of proof and the ruling thereon appear on pages 162-163 of the Record.

II

The Court erred in making Findings of Fact III, XV and XXI, all referring to the making and delivery of the contract in suit, to the effect that the contract was fully and unconditionally delivered, or, if conditionally delivered, the conditions were waived

by appellant, for the reason that there is not sufficient evidence to support the same, and the evidence is contrary thereto, in that the evidence establishes that the contract was delivered by appellant subject to the condition precedent that the contract was not to be in effect unless and until appellant obtained cattle to fill it, and to the further condition that certain provisions therein relating to an allowance of three per cent for shrinkage be eliminated, and the evidence discloses that these conditions were never met.

Further, said findings in legal effect are inconsistent with Finding IV, to the effect that the original contract was modified.

III

The Court erred in making its Finding of Fact V, for the reason that the written contract in suit, described in Finding III does not require the delivery of "good quality" steers, and there is no competent evidence to support any finding to that effect, and the effect of such finding is to vary and add to the terms of a written contract.

IV

The Court erred in overruling appellant's objections to testimony relative to quality of steers claimed to have been intended under the contract, for the reason that such testimony was incompetent, irrelevant and immaterial, and tended to vary and add to the terms of a written instrument.

The testimony, objections and rulings-referred to

are found on pages 22, 23 and 24 of the Record, and the substance thereof is as follows:

Witness Ruud was asked on cross-examination as an adverse party what the quality of the steers covered by the contract was. Objected to that it was incompetent, irrelevant and immaterial, that the contract speaks for itself, and not proper cross-examination. Objection overruled.

After responding that he could not tell quality until cattle had been purchased, witness was asked concerning his testimony in his pre-trial deposition, which deposition was later admitted as Exhibit 10, over objection. He was asked concerning what quality of cattle he had testified he intended to get, and if he did not so testify that the original deal, as it was drawn up, would have been good cattle, had the deal been completed. Objected to that it was an attempt to vary the terms of a written contract. Objection overruled.

V

The Court erred in making Finding of Fact IX, for the reason that there is not sufficient competent evidence to support the same, said Finding in legal effect varies and adds to the terms of a written instrument, and for the further reason that all the evidence as to probable weight of cattle at the time delivery was demanded was based on mere speculation and conjecture.

VI

The Court erred in overruling appellant's objections to questions asked the witness Bert Ruud as

to what he estimated the steers he intended to get would have weighed at the time delivery was demanded, for the reason that such testimony was incompetent, irrelevant and immaterial, the contract did not call for cattle of any particular weight, such testimony was necessarily based on mere speculation and conjecture, and tended to vary and add to the terms of a written instrument.

The testimony, objections and rulings referred to are found on pages 24, 31, 32, 33 and 34 of the Record, and the substance thereof is as follows: Witness was asked what, under conditions existing at his ranch for pasturing and maintaining cattle during the season, cattle purchased in November, 1946, then weighing 525 pounds, would have weighed in August or September, 1947. Objected to on the grounds that the same was incompetent, irrelevant and immaterial, and no foundation laid. No direct ruling appears in the record, but the witness was permitted to answer, and stated that that would depend on certain conditions. Witness was then asked concerning the amount of gain cattle would make during that part of such time they were on his ranch, and after stating that they would gain approximately 150 pounds on his ranch every year, he was again asked concerning his testimony in his pre-trial deposition concerning the weight of the so-called Peterson cattle, and if he did not then testify that if he had gotten the Peterson cattle they would have weighed nine hundred pounds at the time of delivery to plaintiff. Objected to as incompetent, irrelevant and immaterial, not

proper cross-examination, and also an attempt to vary the terms of a written instrument. Objection overruled.

VII

The Court erred in overruling appellant's objections to testimony concerning the weight and quality of certain cattle sold by appellant at Idaho Falls in the fall of 1947, and in the admission of Exhibits 5 and 6, the sales records concerning the same, for the reason that such testimony and exhibits were incompetent, irrelevant and immaterial, had no bearing on any of the issues of the case, and there is not sufficient evidence to show, or even tend to show, that such cattle were the cattle covered by the contract, and the evidence affirmatively shows that said cattle were not the cattle covered by the contract.

The testimony concerning cattle sold by appellant at Idaho Falls appears in a number of places in the Record.

Commencing on page 35 of the Record, witness J. J. Smith testified concerning cattle he had seen on appellant's ranch, which he later saw at the sales yard at Idaho Falls. He was then asked what the weight of these cattle was when he saw them in August, 1947. Objected to as incompetent, irrelevant and immaterial unless it be shown that plaintiff claimed these cattle were the subject matter of the contract. Objection overruled (Record, page 37). Further objection on similar grounds to continuation of this line of testimony overruled (Record, page 38).

Further objection made and overruled (Record, page 40).

Witness Orland Robertson was asked concerning his opinion as to what certain cattle he cared for in the fall of 1946 for thirty days would have weighed the following fall, being the same cattle sold in Idaho Falls in 1947. Objected to as incompetent, irrelevant and immaterial. Objection overruled (Record, page 49). The court required some further foundation as to the qualifications of the witness, and then allowed witness to answer over objection. (Record, page 51).

Exhibits 5 and 6, sales records of these cattle sold by appellant at Idaho Falls were identified and offered in evidence (Record, page 66). Objected to as follows: "We object to the introduction of exhibits 5 and 6. They have failed to connect them with this contract, or the cattle described as the subject matter in issue. It is an attempt to vary or modify the terms of the written contract by parol testimony without any pleading upon which to base such testimony or such a modification of the contract. These could be any cattle. It is incompetent, irrelevant and immaterial and cannot prove or tend to prove any issue in this case." Objection overruled. (Record, page 66).

VIII

The Court erred in making its findings of Fact IV, XIV, XVII and XVIII, to the effect that the original contract was modified only as to the number of steers to be delivered, for the reason that there is not sufficient evidence to support the same, and the

same are contrary to the evidence, in that the evidence establishes that the original contract described in Finding III was abandoned by the parties by the substitution of a new and different agreement, which was in no sense only a modification of the original contract. (Rec., pp. 152-155).

IX

The Court erred in refusing to permit appellant to impeach the witness Louis Salerno. Witness was the agent of respondent who carried on all negotiations with appellant, and he was a hostile and unfriendly witness. Appellant sought to impeach his testimony by the use of the pre-trial deposition of the witness, as permitted by Rule 26 (d) (1). The Court erroneously sustained respondent's objection. (Record, page 129).

X

The Court erred in making its findings of Fact XII, and XXII, both concerned with the market price of steers on the Ogden market at the time delivery was demanded, for the reason that there is not sufficient evidence to support the same, and the evidence shows that the market price for slaughter steers on the Ogden market at the time in question varied from sixteen to twenty-six cents per pound, and by reason thereof, respondent suffered no actual damages in any amount, and the Court thereby further erred in making Finding of Fact XXIII to the effect that respondent did suffer damages in the sum of \$17,100.00, the same being contrary to the evidence, and based upon mere speculation and conjecture.

XI

The Court erred in making Findings of Fact VIII and XX, to the effect that appellant refused to perform the contract and did not offer to perform, for the reason that the same are not sustained by the evidence, and the uncontradicted evidence shows that appellant offered both orally and in writing to deliver steers to respondent to fill any obligation which might exist on his part. (Rec., p. 158).

XII

The Court erred in making its Findings of Fact VI, XIII and XVI, all to the effect that the plaintiff fully complied with the conditions, stipulations and agreements of said contract by paying the down payment required, and by reason thereof there was no failure of consideration, for the reason that said Findings are contrary to the evidence, in that the evidence establishes that the respondent never made the down payment called for by the terms of the original contract described in Finding III, and the payment subsequently made by respondent shows on its face and by other evidence that it was made on another and different subsequent agreement.

XIII

The Court erred in overruling appellant's motion to dismiss at the close of respondent's case, for the following reasons: The evidence did not show unconditional delivery of the contract, and affirmatively showed that the contract was never delivered; that there was never a meeting of the minds of the parties; there was no mutuality; the subject matter

of the contract was never sufficiently identified; it was impossible to ascertain from the contract or from any competent evidence the age of the cattle in question, the weight thereof, or the type; it was impossible to properly compute damages, and any damages that might be computed would necessarily be based on speculation and conjecture, and not on the contract or any competent evidence in the case; further, that the plaintiff failed to prove a cause of action or any damages in the case, and the evidence showed that plaintiff failed to perform the contract on its part.

The motion and ruling referred to appear on pages 123, 124 of the Record.

SUMMARY OF ARGUMENT

I

The evidence shows that appellant had no steers to fill the contract at the time the original contract was being negotiated. Appellant sought to show that it was understood and agreed the contract was not to be in effect until the steers were obtained with which to fill it. Such evidence went to the existence of the contract. It tended to show that it never became operative as a contract.

It was reversible error for the trial court to refuse to permit appellant to show such conditional delivery.

The contract contained recitals that the steers were on the ranch, branded in a certain manner. Respondent was responsible for these recitals being in the contract, but they were put there with full knowledge on the part of both parties that they were mere expressions of something which would be true only at some future date and not of present, existing facts. They were not binding on either party.

The evidence shows that appellant objected to certain of the terms of the original contract, and the parties entered into negotiations after it was signed, resulting in either a modification of the original contract, or the substitution of a new agreement. Although the contract recited it had been made, the down payment called for therein was not made until these subsequent negotiations had been finished, and it was not made on the original agreement but on

the substituted or modified agreement. The modified agreement was also subject to the condition that it was not to be in effect until steers were obtained for it, but the trial court did not permit this to be shown, which was error.

II

The original contract contained no requirements as to weight and grade of steers to be delivered. There is nothing in the language of the instrument or in the nature of respondent's business from which any inferences can be drawn that the parties intended steers of any particular weight and grade. There is no competent evidence to support the court's findings that the steers must grade "good quality," and that the average weight of the steers which should have been delivered was 950 pounds.

Assuming that the steers would have been of good quality, of any specified average weight, if and when they had been acquired, what they would weigh and grade at the time for delivery, ten to twelve months later, would depend on many variable factors. Respondent produced no competent evidence as to such factors, and the trial court's findings rest on mere speculation and conjecture.

The trial court permitted evidence relative to the weight and grade of some steers appellant was trying to get, but did not succeed in getting, for the original contract. It also permitted evidence as to the weight and grade of other steers which respondent had, but which were not shown or claimed to have

any connection with the contract. This evidence was permitted on the theory that the contract was ambiguous. It was not ambiguous, and the evidence was inadmissible, but even though it might have been properly admitted, it did not furnish any basis for the court's findings.

Appellant did not guarantee to deliver steers of any particular weight and grade, nor did the contract so require. The contract actually contemplated various grades. It was error for the trial court to hold that the contract required steers of good quality, of a specific average weight, and its findings in respect thereto are based on speculation and conjecture.

III

The trial court held that the original contract had been merely modified by reducing the number of steers to be delivered. The evidence shows that the original contract was abandoned, and a new agreement made. The court's finding is therefore erroneous, but in either event, whether the original contract was merely modified or wholly abandoned by the substitution of a new agreement, no action can be maintained on the original agreement. The agreement, as modified or substituted, must be pleaded and proved, and a demand or suit on the contract, as originally drawn, is improper.

IV

Louis Salerno, respondent's chief cattle buyer, conducted all negotiations for respondent. He was not called as a witness by respondent. He was, so far

as appellant is concerned, an adverse and hostile witness, but appellant called him to show the actual intentions of the parties with respect to the original contract and in the subsequent negotiations. When he became untruthful and evasive, appellant sought to impeach him through the use of his pre-trial deposition under Rule 26 (d) (1) of the Federal Rules of Practice. It was error for the trial court to deny appellant the right to use Salerno's pre-trial deposition for the purposes of impeachment.

V

All that could have been required under the contract was slaughter steers. The evidence shows that slaughter steers were available on the Ogden market at the time of delivery at prices ranging from 16 to 26 cents per pound for various grades. The contract provided for a price of 17½ cents, live weight, for Grade "A," with other grades to be paid for on basis of difference between buyer's market price for Grade "A" and the various grades actually delivered. Respondent offered no evidence as to difference, if any, for "A" grade and other grades. Accordingly, no damages were proved.

Appellants uncontradicted testimony shows that he offered to perform any obligations he was under to respondent by obtaining steers on the market and delivering them to respondent, but that his offer was declined. Exhibit 11 also shows that he offered to get other steers. The trial court had no right to reject this testimony and find that appellant made no offer to perform.

VI

No down payment was made by respondent at the time the contract was signed, and when a payment was made it was on the modified or substituted agreement. The trial court erred in finding that respondent fully complied with the contract on its part.

Failure to make the down payment at the time the contract was signed and making it on a different or modified agreement, in legal effect, prevented the original contract from ever becoming operative.

VII

The court erred in denying appellant's motion to dismiss at the close of respondent's case, for the reasons stated in the motion. (Rec., p. 123.)

VIII

The trial court adopted an erroneous view of the contract and the making thereof, and made erroneous rulings, with the result that only part of the essential facts were before the court on which to reach a decision in the case. By reason of such errors the trial court was misled into erroneously refusing to give proper credence to appellant's testimony. A new trial should be had under conditions that all the facts are disclosed.

ARGUMENT

I

Did the trial court err in denying appellant's offer of proof that the original contract was conditionally delivered, and that the same conditions attached to the subsequent new agreement or modification of the original contract?

This question is raised by Specifications of Error I and II, and as the legal principles involved apply to each specification, both will be considered together. Appellant here challenges the correctness of Findings of Fact III, XV and XXI.

The trial court found that the parties entered into a valid written contract, unconditionally delivered, on or about November 4, 1946, and that the only change thereafter made was to modify the contract by reducing the number of steers to be delivered from 300 to 240.

Appellant alleges in Paragraph III of his amended answer, in effect, that there was no legal delivery of the written contract for the reason that delivery thereof was subject to two conditions precedent: (1) That the provision therein contained for a three per cent shrinkage be eliminated; (2) That it was understood and agreed the contract was not to be in effect unless and until the defendant procured steers for the contract from other parties.

The record is fairly complete as to the first condition and as to how the parties acted in respect thereto. In his letter, Exhibit 2, which accompanied the contract when he returned it to respondent's agent, Louis Salerno, appellant demanded that the provi-

sion for shrinkage be eliminated. In response to this demand, Salerno stated in his letter of November 15, Exhibit 15, that the provision would have to remain. Salerno did not at that time regard the deal as closed and the contract in effect, as he specifically asked appellant if he wanted to go ahead with the deal. Thereafter they continued negotiating, and sometime in December they either modified the original contract or made a different agreement.

Appellant testified, in effect, that the condition or demand was never met so far as the original contract was concerned, that he did not waive the demand, and that when the parties negotiated a subsequent agreement, he was to receive payment at the rate of 17½ cents per pound, on a live weight basis, without any deduction for shrinkage. (Record, pages 154-155).

Inasmuch as no steers were delivered under either agreement, the matter of how payment was to be made is of no particular importance. It makes no particular difference whether or not this condition was ever met. What is important is that this condition precedent did exist, and it was at least one of the reasons why the parties found it necessary to engage in negotiations after the original contract was signed. It is closely allied with the other or second condition precedent which appellant contends existed, and its importance now lies in how it affects the trial court's finding that the result of the subsequent negotiations was only a modification of the original contract. We will discuss this phase of the case later

in this brief. We are presently concerned with whether or not evidence that such conditions both existed should have been admitted.

With respect to the second condition, the state of the evidence is very different. The trial court refused to permit appellant to show by parol that the contract was delivered with the understanding that it would not take effect until appellant could obtain steers for it. The trial court's rulings were made on the theory that the evidence would vary or alter the terms of the written instrument, as is shown by the following excerpts from the record.

Q. Did you own three hundred head of steers branded O on left hip?

Mr. Olmstead: We object to this as tending to vary the terms of a written contract.

The Court: This is obviously an attempt to vary the terms of this contract.

Mr. Albaugh: This is to show conditional delivery of the contract.

The Court: That again would vary the terms. Do you expect to show an impossibility of fulfillment of the contract?

Mr. Albaugh: No, but to show that it was delivered conditionally, to take effect upon the obtaining of the cattle.

The Court: I understood this conditional delivery to be predicated on the letter of November 3rd, having to do with the shrinkage.

Mr. Albaugh: Both, based on shrinkage and the conditional delivery to take effect when he could obtain the cattle.

The Court: It is difficult to imagine in this case an attempt to vary this by parol evidence.

Mr. Albaugh: The parol evidence is not varying the terms of the contract if the Court please. It is to show that it was to take effect upon the happening of certain conditions.

The Court: Let me call your attention to the provisions that the 300 head owned by and held on the seller's ranch were to be delivered - - -

Mr. Albaugh: - - That was erroneous.

The Court: You have not asked for a rescision of the contract. The objection is sustained.

(Record, pages 141-142)

Appellant then and now contends that the evidence in question does not tend to vary or alter the terms of the written instrument, but is to show that the writing never became operative as a contract. The evidence which the court excluded goes to the existence of the contract, not to its terms.

Evidence is admissible for such purpose, under a well-known rule of law which is one of the recognized exceptions to the so-called "parol evidence rule."

The "parol evidence rule" which excludes evidence of a prior or contemporaneous oral agreement which would vary a written contract presupposes the existence of a valid written contract. 20 Am. Jur. 954. *Bell vs. Mulkey*, 7 S. W. (2d) 115.

Speaking generally, if the parol evidence attacks the existence of the contract, it does not fall within the condemnation of the "parol evidence rule." 20 Am. Jur. 954. Accordingly, such evidence is admissible where the existence of the contract is the subject of inquiry. This principle is the basis for the

admission of evidence in many cases, such as to show fraud or mistake which goes to the existence of the contract. Many other instances may bring into question the existence of the contract. Evidence which tends to negative such existence is admissible.

Non-delivery, or delivery which was only conditional, are matters going to the existence of the contract, and ordinarily may be shown by parol. The rule is stated in 20 Am. Jur. 955, as follows:

“The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to a written contract which is in force as a binding obligation. Parol evidence is always competent to show the non-existence of the contract or the conditions upon which the writing is to become effective as a contract. Evidence is admissible, at least in equity, to show that a writing which apparently constituted a contract was not intended or understood by either party to be binding as such. The oral testimony in such a case does not vary the terms of the writing, but shows that it was never intended to be a contract or to be of binding force between the parties. The rule that excludes parol evidence in contradiction of a written agreement has no application if the writing was not delivered as a present contract.”

Examination of some of the cases cited as authorities for various parts of the foregoing show that the rule is well supported.

In *McFarland v. Sikes*, 54 Conn. 250, 7 A. 408, 1 Am. St. Rep. 111, the action was upon a promissory note.

Defendant claimed delivery was conditional. The court said:

“A written contract must be in force as a binding obligation to make it subject to this rule. (Parol evidence rule). Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a valid obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise, and by parol evidence.

“Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note, in its terms, is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them.”

White Showers v. Fischer, 278 Mich. 22, 270 N. W. 205, involved a contract for purchase of an irrigation system. Defendant sought to show that the contract was delivered on condition that he would be allowed to cancel a similar contract given to another company, and that he could not effect the cancellation. In holding the evidence was admissible, the court gives a well-reasoned discussion of the rule, and cites many authorities. Among the cases cited, we believe the following are particularly in point, *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 73 N. W. 239, and *Ware v. Allen*, 128 U. S. 590, 9 S. Ct. 174, 32 L. Ed. 563.

In *Bultman v. Frankhart*, (Wis.) 215 N. W. 432, defendant signed a written contract for the purchase of a piano. The contract recited the making of a down payment, receipt of which was acknowledged by the seller. Actually no down payment was made. It was held that parol evidence was admissible to show that there was a contemporaneous oral agreement that the contract was not to be in effect until the down payment was actually made.

The law in Idaho on the subject is set forth in a well-reasoned opinion in *Continental Jewelry Co. v. Ingelstrom*, 43 Idaho, 337, 252 Pac. 186. The case involved a written contract for the sale of jewelry by plaintiff. Defendant was held entitled to show by parol that it was agreed with the salesman who took the order that the contract would not become effective until two conditions were met, viz: (1) That a threatened strike should be settled, and business restored to its normal condition, and (2) that the defendants should advise plaintiff the names of a number of prospective customers, and the plaintiff would then advertise the goods by mail to such persons and urge them to purchase such jewelry from defendants. The court cites a large number of cases supporting the rule.

Of the cases cited, we might mention *Colonial Jewelry Co. v. Brown*, (Okla.) 131 Pac. 1077, where it was held that the buyer who had signed a written contract for the purchase of jewelry could show a contemporaneous oral agreement with the salesman who took the order that the contract was not to be in

effect until five days after its execution, during which time defendants were at liberty to cancel the order, and that they so cancelled within the five days.

The rule permitting parol evidence to show a condition precedent applies to a number of different situations, and the cases on the various phases are innumerable.

It has found application in the type of cases where the condition was that the contract would not be in effect unless delivery could be made within a specified time. An example of this type, which has been cited many times, is *S. H. Bowser Co. v. Fountain*, 128, Minn. 198, 150 N. W. 795, L. R. A. 1916B 1036. The case involved a contract for the sale of a gasoline storage outfit. Defendant contended that there was a parol understanding that the contract was not to be in effect unless delivery was made within a specified time, and that the condition was never met. The court said:

“Another rule equally well settled, however, is that, in case of a simple contract in writing, it is competent to show by parol that, notwithstanding the delivery of the writing, the parties intended and agreed that it should be operative as a contract only upon the happening of a future contingent event, or the performance of a condition. *Westman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; *Merchant's Exch. Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434; *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048. The purpose and effect of such evidence are to

prove a condition precedent to the attachment of any obligation under the written instrument. This is not to vary the written instrument, but to prove that no contract was ever made, that its obligation never commenced."

It has been applied to cases involving the sale of real estate, where it has been held competent for the buyer to show by parol that it was understood that the contract would not take effect unless the seller could deliver possession within a specified time. *Yeager v. Jackson*, (Okla) 19 Pac. 2d 970. The court said:

"In *Gamble v. Riley*, 39 Okl. 363, 135 Pac. 390, the second syllabus is as follows: It is elementary that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument; this is not to vary the terms of a written instrument, but to prove that no contract was ever made; that its obligation never commenced."

The rule has been applied to permit parol testimony that a lease would be ineffective unless the landlord made repairs. *James v. Cortwright*, 220 Ala. 578, 126 So. 631.

In *Atlas Petroleum Co. v. Cocklin*, 59 Fed. 2d 571, it was held that evidence of contemporaneous oral agreement was admissible to show that a written contract for the sale of distillate was not to be in effect until price had advanced.

In Washburn-Crosby Co. v. Riccobono, 162 La. 698, 111 So. 65, parol evidence was held admissible to show that outright sale contract in writing was conditional on approval of samples to be furnished.

A common application of the rule, so well known as to need no citation of authorities, is in that class of cases where one who signs a written contract is permitted to show that it was not to be in effect until signed by others, such as subscription contracts for the sale of corporate stock, and where donations or subscriptions to charitable or educational institutions are made on the understanding that they will not be effective until a certain total has been reached.

Appellant's contention that it was understood the contract was not to be in effect until the steers were obtained for the contract finds substantial support in the subsequent dealings of the parties. The very fact that they continued negotiating and eventually reduced the number of steers called for by the contract is quite persuasive that something kept the contract from being regarded as final by the parties. The fact that respondent did not make the down payment until the parties made such a reduction is persuasive. The only reason for making any reduction was because appellant had not procured the steers for the contract.

Appellant sought to show that the modified agreement was subject to the same condition that he would first have to get the steers for the contract before it became operative, but the trial court would not permit him to do so. (Record, page 153). Although the

trial court found that the original contract was merely modified and was not abandoned, in either event, appellant should have been permitted to show not only the existence of this condition precedent, but all the other terms and conditions of the subsequent agreement or modification as well. He was permitted to testify to some of these subsequent negotiations, but the trial court very apparently rejected his testimony, although it was not disputed.

Under the particular circumstances of this case, there is nothing inherently improbable about the parties making such a condition precedent to the contract becoming effective. Salerno knew that appellant did not have the steers, not only when the original contract was made, but also when they agreed to reduce the number to be delivered. (Rec. Pages 127, 152). In the very nature of things, the steers would have to be obtained before the contract could mean anything. Such a condition did not vary or alter the contract; it went to the existence of the contract, and as such, evidence thereto should have been admitted.

II

If appellant was required to deliver 240 steers, what would have been their weight and grade?

Specifications of Error III, IV, V, VI, and VII are all concerned with the above question, and are accordingly considered together. The correctness of Findings of Fact V and IX is challenged.

As we have stated, the trial court found that the parties entered into a valid, written contract, and

that the only change thereafter made was to modify it by reducing the number of steers to be delivered from 300 to 240. Appellant does not concede this to be correct, but for the purpose of discussing the trial court's findings as to weight and grade, we will disregard any question of conditional delivery of the contract, its validity otherwise, and as to what happened to it by way of modification or abandonment after it was signed.

The trial court found that appellant was required to deliver steers which graded "good quality," and that the average weight of the steers which should have been delivered would have been 950 pounds. Appellant challenges these findings for the reasons (1) there is nothing in the contract which requires delivery of steers of any particular weight or grade, (2) the legal effect of such findings is to vary and add to the terms of the written contract, and (3) there is no competent evidence to support such findings.

We necessarily and properly first look at and analyze the written instrument itself to determine just what, if anything, is expressly stated therein in respect to what weight and grade are required.

The contract recites that the Seller (appellant) "is the owner of certain steers now held upon the Seller's ranch near Irwin, Idaho, which said steers are branded O L Hip", that the Buyer (respondent) "desires to purchase three hundred (300) head of said steers," and the "Seller hereby agrees to sell and deliver to the Buyer, and the Buyer hereby

agrees to purchase from the Seller three hundred (300) head of the steers hereinbefore described". This language is the only description of any nature which appears in the instrument. There is absolutely nothing stated as to the breed, age, kind, weight, or grade.

At first thought, it would appear that no difficulty or question could ever arise over any such matters. The recitals that the steers were on the seller's ranch, branded in a certain manner, seem to be complete and positive identification. Under the ordinary rules applicable to such a situation, it would be understood that at the appropriate time, the seller would make a selection of the required number out of the larger herd on the ranch. The buyer would take them, as so selected, as they came, regardless of their age, size, weight, grade, or anything else, so long as they were the steers described in the contract. It would be presumed that the buyer knew what all the steers on the ranch were in these respects, and that he would be satisfied with whatever he received, so long as they came from the specified source.

The difficulty, however, arises in this case, for the reason that these recitals that the steers were on the ranch and branded were not statements of fact existing at the time the instrument was signed, and were not intended by the parties to be taken as such. There were no such steers on the ranch, and both parties knew it, and knew the steers would have to be acquired at some later date. (Record, P. 152-155).

We will show that these recitals stated things which both parties knew would not, and could not, take place until several months after the contract was signed.

There is, and can be, no doubt but that both parties knew there were no steers on the ranch. All negotiations were carried on by appellant and Louis Salerno, respondent's chief cattle buyer. Appellant testified that he did not have any cattle on the ranch at the time the contract was signed, except a few fat cattle then being marketed, and that Salerno knew this to be the case. (Record, page 35). Salerno himself also testified that he knew there were no cattle for the contract on the ranch and that appellant would have to buy them. (Record, page 127).

There are other indications in the evidence which show that the parties regarded these recitals as statements which would be the actual fact only at some future time. Appellant's ranch was located in a country of heavy winter snows, where winter feeding would not be practical. (Record, page 34). Salerno knew the cattle would not be wintered on the ranch, but would be wintered where feed would be available. (Record, page 128). He knew the character of appellant's ranch, and did not expect the steers would be placed on the ranch until pasture was available in the spring. (Record, page 129).

The contract was prepared by respondent's attorney, under directions given by Salerno. (Record, page 127). It was Salerno who was responsible for these recitals being in the contract, although he

knew the steers were not on the ranch, and that they would be placed there and branded as described in the contract only after several months.

There is still another illustration of the fact that Salerno caused statements to be put into the contract which were on their face recitals of existing facts, but actually of things which the parties understood would take place at some future time. This is the statement that "the Buyer herewith pays to the Seller, receipt of which by the Seller is hereby acknowledged, the sum of Three Thousand (\$3,000.00) Dollars, as partial payment on the purchase price of said steers." The evidence shows that no such payment was actually made at the time appellant signed the contract. There was some disagreement over some of the terms of the contract, and no payment was even offered by respondent until these things had been ironed out. It was actually about six weeks later that a draft was delivered to appellant, (Ex. 16) and the draft shows on its face that at least one change had been made in the contract, being a reduction in the number of steers to be delivered under it.

It is not disputed, and cannot be disputed, but that both parties fully understood the situation, and there is no claim that anyone was in any way misled by any of these recitals, nor is there any claim made by respondent of misrepresentation or fraud on the part of appellant when he signed the contract containing these recitals that the steers were on the ranch, branded as described.

More to the point on the issue we are here considering, however, there is nothing in these recitals as to the weight or grade of the steers at the time the contract was signed, and certainly nothing from which any inference can be drawn as to what the weight and grade would be at the time of delivery, some ten months later. Assuming, for the moment, that the steers had actually been on the ranch at the time the contract was signed, that they then graded "good quality", and that their average weight was some specific figure, say 500 pounds, how they would grade and what they would weigh nearly a year later would depend on many factors. Weather and quantity and quality of feed would play important parts. Cattlemen speak of a "good year" or a "poor year" for cattle. They also say that some of their cattle turn out to be "good feeders" but that others prove to be only fair or poor in that respect. Insects and noxious weeds have their effect on both weight and grade. In any herd of such size, there will normally be a considerable variation, both in weight and grade, even under the best conditions. Over this length of time, some would no doubt prove to be of excellent quality, some would grade good, but some would only grade fair, and so on down the line. Every herd has its choice "off the top" animals, but it also has its "tail enders." The parties took this into consideration in this case, as is apparent by their providing in the contract for a variation in the price to be paid according to how the steers graded.

Inasmuch as the parties knew and understood

there were no steers on the ranch, the recitals in the contract purporting to identify the contract steers by location and brand furnish no actual aid in determining what would be the weight or grade required under the terms of the contract. The contract being otherwise silent as to any such requirements, nothing can then be determined from the instrument itself in respect thereto. Accordingly, the court's findings as to weight and grade of steers to be delivered cannot rest upon any specific or expressed provisions, recitals, or language which can be found in the contract itself.

Is there any other basis for the court's findings in these respects?

Respondent argued to the trial court, and will no doubt urge here, that, because it was in the meat packing business, it can be inferred that the parties intended good quality slaughter steers. We do not believe this is a legitimate or reasonable inference. We will go along to the extent of saying that they did intend the steers for slaughter purposes, because the contract provides that payment should be made on a dressed weight basis, but that is as far as any inference can go from the mere fact that respondent is in the meat packing business. It is notorious that meat packing companies buy every kind, grade, and quality of animals that the market provides, and they slaughter them all. The only limitation they ever observe is that, if the meat is intended for human consumption, it must pass federal inspection. We do not know just how many different

grades there are on the market, but there certainly must be a considerable number, ranging all the way from the very choice down to the cutters, canners, and bologna bulls. They are all "slaughter" animals, and the packers buy every grade for slaughter purposes.

As we have stated, the contract itself indicates that the parties themselves knew there would necessarily be a difference in grades, and they provided accordingly by setting up a formula under which the price paid would vary according to how the steers actually graded when they were delivered. The contract does not specify any limits on how high or how low the steers might grade, nor are there any requirements that any particular number or percentage would have to be of any specific grade.

It follows, that the only inference that can be fairly drawn from the contract itself as to grade is that the parties contemplated various grades, as long as they were slaughter steers. The contract, then, could have been satisfied by delivery of slaughter steers of any grade. To find, as the trial court did, that the contract required all the steers to be of one particular grade or quality directly contradicts the express language of the contract. Such finding tends to vary and add to the terms of the written instrument.

On this subject of the inferences which can reasonably and properly be drawn in this case, certainly there is nothing in the language of the contract from which it can be inferred that the steers were to be of any specific average weight. Nothing at all

is stated. The contract simply leaves the matter wide open.

The trial court, in its memorandum decision, says that the contract, as construed by appellant himself, contemplated steers of good quality. This has absolutely no foundation in the evidence. Appellant said he would try to buy good steers for the contract. (Record, page 23). He also said the Peterson steers would have been good quality if he had been able to get them. (Record, page 113). Naturally it would be to appellant's benefit to get good steers whether they were for the contract or for any other purpose, but that is certainly different from construing this contract to mean that he had to deliver only steers that graded "good quality." He undoubtedly meant to get good steers if he could, but he did not guarantee anything of that kind.

It follows that the court's findings as to both weight and grade cannot be based upon, and are not supported by, any inferences that can be properly drawn from the writing itself.

Nothing being expressly stated, and there being no particular language from which any inferences can be drawn, as to either weight or grade, if there is any basis anywhere to support the court's findings, it would have to be found in the evidence, which we will now examine.

Over appellant's objections, the court admitted certain evidence more or less directed to the subject of weight and grade. Appellant contends that this evidence was erroneously admitted in the first place,

and further, even if admissible, it does not furnish any sufficient or reasonable basis for what the court found.

It is, of course, only where the language of a contract is ambiguous and uncertain, and susceptible of more than one construction, that a court, may, under well established rules, interfere to reach a proper construction, and make that certain which is itself uncertain. 12 Am. Jur. 752. *Griffin v. Fairmont Coal Co.* (W. Va.) 53 S. E. 24, 2 LRA (NS) 1115.

A further limitation on this right of the court to construe a contract is the rule, as stated in *Tappen v. Idaho Irr. Co.*, 36 Idaho, 78, 210 Pac. 591, that the intention of the parties to a contract is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question not being of the intention existing in the minds of the parties, but what intention is expressed by the language used.

It should also be kept in mind that Idaho follows the universal rule that a written contract, in case of doubt or ambiguity, should be interpreted against the party who has drawn it. *Hauter v. Coeur d'Alene Min. Co.*, 39 Ida. 621, 228 Pac. 259.

Whether or not parol or extrinsic evidence was admissible to show what weight and grade of steers was required by the contract depends entirely on whether or not there is any real uncertainty or ambiguity in the instrument in respect thereto. As the

contract was originally drawn, apparently no uncertainty or ambiguity could ever arise. As we have said, if the recitals as to location and brand had been true, no question of this kind would occur, because respondent would have had to take the steers on delivery as they came, and weight and grade would be of importance only in calculating the price to be paid. Because these recitals were not, and were not intended by the parties to be, representations of actual facts, we must, in effect, eliminate them from the contract in construing it. We would then have left a contract which provides merely for the sale of 300 unidentified steers, at a price to be determined according to how they graded and weighed on delivery. Is there now any uncertainty or ambiguity?

Such elimination leaves the subject-matter of the contract unidentified, and there does appear to be some uncertainty in that respect. Parol or extrinsic evidence would accordingly be admissible to identify the subject-matter, such as showing that some specific herd was intended, or that the parties had agreed on some particular kind, age, weight, and grade. But that is as far as such evidence could go, and it could properly be admitted only to so identify the subject matter. If so limited, it would not tend to vary the contract, but would only make certain the uncertainty as to subject matter.

So far as any expressions of what weight and grade would be required, the contract is just as complete and certain as it ever was, with these recitals eliminated. The elimination does not affect the con-

tract in any way in those particular respects. Even with these recitals in the contract there is no provision or stipulation or warranty that the steers were to be of any specific weight or grade, and the mere elimination of the recitals cannot possibly be so construed so as to add anything of that nature to the instrument.

The trial court's findings that appellant was required to deliver steers of specific weight and grade, in effect, imports something in the nature of warranties to that effect into the contract. Allowing evidence to be introduced that the steers should be of some specific weight and grade could only have been done on the theory that such warranties could be implied and imported into the contract.

It is a well recognized rule, however, that if a written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is omitted which it is clear the parties intended was to be supplied by extrinsic evidence, parol evidence is not admissible to supply any claimed omissions. *Naumberg v. Young* (N. J.) 43 Am. Rep. 380; *Hei v. Heller* (Wis.) 10 N. W. 620. The court must determine from the writing itself whether the same is a full expression of the agreement of the parties. *Armstrong Paint Co. v. Cont. Can Co.* (Ill.) 133 N. E. 711.

In case of sale of a chattel, where the parties have reduced to writing what appears to be a complete and valid contract of sale, it will, in the absence of fraud, accident or mistake, be conclusively presum-

ed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements as to the quality of the chattel is inadmissible to add to, take from, or vary the written instrument. *Bond v. Perrin*, (Ga.) 88 S. E. 954. *Hoffman v. Franklin Motor Car Co.* (Ga.) 122 S. E. 896.

Where a contract for the sale of coal described it as screenings from a certain plant, it was held in *Sterling-Midland Coal Co. v. Great Lakes Coal* (Ill.) 165 N. E. 793, that parol evidence was inadmissible to show that seller had been informed of the purpose for which the coal was intended and had made an express warranty of quality.

The case of *Geo. A. Moore & Co. v. Mathieu*, 13 Fed. 2d 747, affirming a district court decision reported in 4 Fed. 2d, 251, is quite in point. Contract was for the sale of "native brown sugar" to be shipped from a specified locality. The court held that the contract would be satisfied by a tender of sugar meeting such description, and no warranty as to quality or grade could be implied.

In *Interstate Grocery Co. v. George William Bentley Co.*, 214 Mass. 227, 101 N. E. 147, the court said:

"Upon the sale of goods, by name or description, in the absence of some other controlling stipulation in the contract, a condition is implied that the goods shall be merchantable under that name. They must be goods known in the market and among those familiar with that kind of trade by that description, and of such quality as to

have value; this is not a warranty of quality. It does not require any particular grade."

Streff v. Gold Medal Creamery Co., (Cal.) 273 Pac. 831, involved a claim for damages on account of milk delivered not being of high quality. The written contract merely provided that, "Seller hereby agrees to sell all milk to purchaser" at a specified price. At the trial, the court permitted introduction of testimony as to an oral contemporaneous agreement to the effect that the seller was to furnish milk of a certain quality. Seller denied any such agreement. Inasmuch as the trial court found that there was no such oral agreement, the appellate court did not have to pass on the admissibility of the parol evidence, but it indicated the evidence should not have been admitted. The court said:

"Furthermore, defendant admitted in open court that the milk was merchantable. There was nothing in the contract to show that any special grade or quality of milk was to be furnished. The requirement of merchantability, assuming there was an implied warranty as to merchantability under Section 1768 of the Civil Code (Uniform Sales Act) does not require that the goods be of first quality, or even that they shall be as good as the average of goods."

Kenney v. Grogan (Cal.) 120 Pac. 434, involved a case of a sale of a growing crop of olives, nearly matured. Before delivery, the olives were badly frosted, and to preserve them from total loss, the buyer received them and processed them into oil, as they could not stand reshipping to the seller. The oil recovered was of an inferior grade. The seller brought

an action for the contract price, and recovering only a part thereof, appealed. In reversing the lower court, the supreme court, applying the rule, said:

“Referring to the term ‘merchantable’, Willis-ton on Sales, Section 243, states the following: ‘The requirement, when it exists, that goods shall be merchantable does not require that the goods shall be of first quality, or even that they shall be as good as the average of goods of the sort*** If there is no warranty of fitness for a particular purpose, the buyer cannot claim more than that the goods, with their defects known, shall be salable as goods of the general kind which they were described or supposed to be when bought.’ Our conclusion is that, under the circumstances of this case, including the conditions surrounding the making of the contract between the parties to this action, there was no implied warranty imposed upon the plaintiff as to the quality which the olives should possess at the time of delivery; and that, further, even conceding that an implied warranty as to merchantable condition became a part of the contract, then the evidence is insufficient to sustain the finding of the trial court wherein it is determined that the fruit as furnished was unmerchantable.”

In *Rollins vs. Northern Land & Logging Co.*, (Wis.) 114 N. W. 819, plaintiff agreed to sell “spruce pulp wood”, at an agreed price, on future delivery. Defendant claimed it was of inferior quality, and refused to pay the full price. The court held that there was no implied warranty that the wood was of any particular quality, and that so long as it was “spruce

pulp wood", plaintiff was entitled to the contract price.

We call attention to the recent case of *Salzman v. Maldaver*, (Mich.) 168 A. L. R. 381, 24 N. W. 2d, 161, which illustrates the rule. The court said:

"In the second count of the declaration plaintiffs alleged the breach of an implied warranty of quality and fitness. They claim that this implied warranty arose by reason the fact that, prior to the execution of the written contract, they had informed defendants of the purpose for which the aluminum sheets were to be used, that is, to manufacture kitchen utensils and other articles in which aluminum would appear in its natural state. The written contract did not indicate for what purpose the aluminum was to be used, and plaintiffs base their claim of an implied warranty only upon oral representations made prior to its execution. Here, again, the parol evidence rule, as a rule of law, bars plaintiffs from asserting an implied warranty which could be established only by parol evidence which would vary the terms of the written contract. The written contract was clear and unambiguous, and parol evidence could not be adduced to add to or change the contract so as to create either an express or an implied warranty."

There is an exhaustive and illuminating annotation on the subject in 70 A. L. R. 752, to which we invite the court's attention. In the interests of brevity, we will not attempt to review the same, but simply state that from that annotation and the cases we have cited, by way of summary, it may be said: (1) Where the written contract appears to be com-

plete on its face, in the absence of fraud, accident, or mistake, parol or extrinsic evidence is not admissible to prove that the parties contemplated a particular quality or kind, and no implied warranty to that effect can be added to or imported into the contract.

(2) The only warranty as to quality or kind that can be implied is that the goods be of merchantable or salable quality, corresponding with the description stated in the contract, and there is no warranty that they shall be of any particular grade or quality.

We therefore contend that the trial court erred in admitting, over appellant's objections, any evidence as to the grade and weight of steers which it is claimed appellant should have delivered under the contract. In addition, we contend that the evidence which the court did receive in these respects, even if admissible, does not furnish any proper or reasonable basis for the court's findings as to such matters. We think this will be demonstrated by a consideration of the evidence on this point, which we will now discuss.

The matter first came up when appellant was called for cross-examination as an adverse party. (Record, page 22). Appellant was asked directly what was the quality of the steers covered by the contract. Appellant answered that he could not tell the quality until the steers had been purchased. He was then asked what his testimony was concerning certain steers which he had given in a pre-trial deposition. The court observed that the contract was, in a

measure, ambiguous.

The deposition referred to is in evidence as Exhibit 10. It appears therefrom that at the time the deal was being negotiated, appellant expected to obtain some steers from some cattle ranchers known as Peterson Brothers, located in the Big Hole country, near Jackson, Montana. He had been negotiating with them, and believed he could get enough steers from them to partially, if not completely, fill any contract he might make with respondent. He kept delaying—as he puts it, “stalling”—closing any deal with Peterson Brothers until he had closed the contract with respondent. Although the original contract had been signed, neither appellant nor respondent regarded the deal as closed, as evidenced by the fact that the parties continued negotiating for several weeks, and respondent delayed making the down payment of \$3,000 for several weeks until a final agreement was reached. In the meantime, Peterson Brothers changed their minds, and decided not to sell. (R-111-115). Appellant then advised respondent’s agent, Salerno, that he had lost out on getting the Peterson steers. In this deposition he did testify that the Peterson steers would have been good quality steers if he had gotten them, and that they weighed about 525 pounds average at that time. He was asked what they would have weighed in August or September of 1947, if he had maintained and cared for them on his ranch under the conditions which existed. All of this testimony was objected to, but the objections were overruled. (Record, pages 22-24,

31-35). He answered that it would depend on various things, and that usually they gained about 150 pounds during the period he could keep them on his ranch. Over further objection, he was then asked if he had not testified in his deposition that the Peterson cattle would have weighed about 900 pounds at the time of delivery. He stated that they probably would if they had a good year. He explained further that part of the gain would have been made on hay during the winter, and that the 150 pounds was the gain they would make during the summer period on grass at the ranch.

However, appellant was not required to obtain these Peterson steers, or any other particular steers, for the contract. He was at liberty to purchase steers wherever he could find them, in Montana, Idaho, or Wyoming. (Record, page 146). Assuming that the Peterson steers would have been of good quality or grade, and that they would have weighed an average of 525 pounds, if he had obtained them, does it follow that steers which he would or could obtain elsewhere would necessarily grade or weigh the same? That would be an absurd conclusion. We can assume it would be to appellant's best interests to try to get the best grade he could find, but was he under any obligation to obtain any particular grade? Was there any obligation to get steers of any certain weight? The contract does not say so. If he had gotten the Peterson steers for the contract, and later on it turned out that he was mistaken in his judgment, or if he had a poor feeding season, or

for any other reason they did not grade as good quality or reach some specific weight a year later, would that have been a breach of the contract?

At any rate, he did not get the Peterson steers, and respondent does not claim they were connected with the contract in any way. What their particular weight and quality was is certainly immaterial, and the testimony relative thereto does not prove any issue in this case.

Many pages of the record are taken up by evidence concerning certain steers which appellant sold in Idaho Falls in August and September of 1947. (Record, pages 35-83). The testimony shows that appellant was buying and selling cattle of all kinds all of the time. (Record, pages 21-22. The contract itself recites that he had other cattle.

When respondent began introducing evidence relative to these steers sold at Idaho Falls, appellant objected thereto on the ground that it would be immaterial unless it be made to appear that these steers were claimed by respondent to have some connection with the contract. The court overruled the objections, and the rulings are assigned as errors. (Record, page 37, 40).

It appears from the record that these particular steers were acquired by appellant from several different owners, some time in 1946, the exact time not appearing in the record. They were purchased by appellant from Wyoming owners, and were being fed that winter in the area known as Jackson Hole

in that state.

Although the trial court said in its memorandum decision that there could be no doubt but that defendant expected to use these Wyoming steers, pro tanto to fulfill the contract, we think the evidence shows conclusively that these Wyoming steers had no connection therewith. The trial court based its thought on the matter apparently on the belief that the steers then bore the O brand on the left hip. The evidence shows, however, that this was not in any sense a brand. It was only a mark left by the bottom of a bottle dipped in green paint. It was put there only to identify the steers while they were being moved, and would wash off in a short time. (Record, page 147). The evidence, however, was almost entirely to the effect that these steers had no connection with the contract. First and foremost, we have appellant's direct and uncontradicted testimony that they were not the contract cattle. (Record, page 145). He had these cattle when the witness Orland Robertson went to work for him feeding them, which was about November 9th, 1946. (Record, page 46). At that time, as we have pointed out, neither appellant nor respondent's agent, Salerno, regarded their deal as closed. They did not come to any final agreement, which the trial court found was merely a modification of the original contract, until about December 9th, when the \$3,000 draft was turned over by Salerno. Appellant told Salerno just before the draft was delivered to him that he had not been able to get steers for the contract (Record, page 152). This testi-

mony stands uncontradicted and undisputed. At that time he had owned these Wyoming steers for at least a month, and there were only 218 steers in that bunch. If they had been intended as the cattle for the contract, there was no reason on earth why he would not have so told Salerno, and in the very nature of things, he certainly would have done so, and if he had, Salerno would have so testified. The fact that respondent did not make any attempt to have Salerno identify these Wyoming steers as the subject of contract, and did not call him as a witness for that purpose, is highly significant. The quite obvious conclusion is that he knew they were not the contract cattle.

We digress, for a moment, to point out that Idaho follows what is but the general rule that if a party fails to produce the testimony of an available witness on a material issue in the case, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call him. *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 6 Pac. 2d 486, 51 Idaho 490; *Bedke v. Bedke*, 53 Pac. 2d 1175, 56 Idaho 235.

Appellant's testimony that the reason the parties did not go through with the deal according to the contract as originally written was because he had not been able to get steers for the contract also stands uncontradicted. (Record, page 153). Appellant claims the original deal was abandoned. The court found that it was only modified. In either event, the only reason for any change in the contract

would be because appellant had failed to get steers for it. There could have been no other reason for any change. Notwithstanding appellant had these Wyoming cattle while these negotiations were being carried on, it was still made plain to Salerno that appellant was thereafter still to acquire steers for the deal when they made the modification. (Record, page 153). We do not conceive of anything that would more clearly show that these Wyoming steers had nothing to do with the contract, but there are still other things which indicate the same thing.

Appellant's testimony in his pre-trial deposition about the Peterson steers was that they averaged about 525 pounds at the time he expected to acquire them. (Record, page 24). He testified at the trial that the contract provided for dehorning and that would indicate respondent wanted light weight or "short" yearlings. (Record, page 146). As appears from Exhibits 5 and 6, the Wyoming steers varied a great deal in weight, all the way from 845 to about 1300 pounds. They had been dehorned before appellant acquired them, and had been branded with several different brands. They were "long", not "short", yearlings. (Record, page 145). These things indicate that they were generally more mature than the young type steers which appellant and Salerno had in mind. Admittedly, a few of them might have been used to fill out the deal, and probably would have been acceptable to respondent, but the evidence as a whole, shows that, taken as a group, they were not

intended to be the steers for this contract.

Respondent made no attempt to identify the subject matter of the contract, or to tie the contract to any particular cattle. It made no claim that these Wyoming steers were the contract steers. Its agent, Salerno, testified that when he made demand on appellant for delivery, he was not claiming, and could not claim, these particular steers. (Record, page 131). As we have said, if these steers had any connection with the contract, Salerno certainly would have known it, and he undoubtedly would have so testified.

It follows that evidence as to the weight and grade of the Wyoming steers was not material to the issues of this case. Appellant's objections to evidence concerning the same should have been sustained.

There remains just one more item bearing on the issue of grade or quality. When appellant signed the contract, and sent it back to Salerno, it was accompanied by a letter, Exhibit 2. In this letter appellant indicated that he had acquired part of the steers for the contract, and that they were "the best bunch of steers I ever fed." It does not appear what particular steers he referred to in the letter. It appears most probable that he was referring to the Peterson steers, which he at that time thought he was going to get, because he says he would be at Jackson with the cattle, and Jackson, Montana, was the location of the Peterson ranches. (Record, pages 111-112). It was the time the fall run of steers was on the market, they were available and he was anxious to get

the down payment from respondent so that he could, in turn, close his deal with Peterson Brothers. Respondent did not make the down payment on the strength of this statement, however, nor was it misled in any way about appellant having the steers, because thereafter, and before any money was paid over by respondent, appellant told Salerno he had "fallen down" on getting the steers for the contract. (Record, page 152). This stands uncontradicted in the record.

The important point, however, is that there is nothing in this statement which binds appellant to deliver steers of any grade or weight. As we have already said, even if he had acquired good quality steers of any particular weight, what their weight and grade would be months later, when the time came for delivery, would depend on many factors. Competent evidence should have been submitted by respondent on this point, but no such evidence was offered.

Particularly with respect to the question of weight, there is another most vital objection to this evidence, so far as it supplies any basis for the court's finding of a 950 pound average. That figure was never mentioned with reference to the Peterson steers. Nor do the weights of the Wyoming steers, as shown in Exhibits 5 and 6, support any such figure.

With respect to the Peterson steers, it was stated that they would probably have weighed about 900 pounds, if they had a good year. (Record, page 34).

That this is highly speculative and rests upon conjecture is apparent, but in any event, it certainly does not support any finding of 950 pounds.

We might say, in passing, that the weight of any herd of steers over a ten or twelve months period would certainly be affected by many factors, even more than how they would grade at the end of that period. If we were to assume, for the purposes of argument, that the Peterson steers were intended to be the contract cattle, and that they weighed 525 pounds, on an average, in November, 1946, what they would weigh in August or September, 1947, would be anybody's guess, in the absence of any evidence as to surrounding circumstances, rainfall, pasture, etc., but it would be no more than a guess. The duty of proving how they would be affected by these many factors rested on the respondent, but it offered no evidence.

Exhibits 5 and 6 are the sales records of the steers which we have referred to as the "Wyoming" steers. These exhibits show the weights of some individual animals and the weights of several groups or bunches of animals, 218 head in all. Weights of individual animals varied enormously, from 845 to about 1300 pounds. This wide variation in itself demonstrates how absurd, if not impossible, it is to base any finding on the weights of these animals as to what would have been the average weight of the steers which should have been delivered under the contract. Moreover, even the average weight of these 218 head has

no relation to the figure selected by the trial court.

The 950 pound figure was plucked out of thin air, and there is absolutely no basis in the evidence for it.

We are well aware that in construing a contract, the court may make certain that which can be made certain, but there must be some evidentiary basis for what the court does find. So far as the evidence in this case is concerned, it would be just as reasonable for the court to find that the steers should weigh 845 pounds, or 900, or 1300, or any other figure. Any figure arbitrarily selected would have just as much support in the evidence. From the evidence submitted by respondent in this case, or perhaps we should say from the lack of evidence, any attempt to say what an average weight of 300 or 240 steers, as the case may be, which were unidentified, would be many months in the future, necessarily must rest on pure speculation and conjecture. And even if they had been properly identified, to say what they would weigh months later is still highly speculative, unless there is competent evidence about the many factors which would influence their weight in the meantime.

If there was any actual ambiguity in the contract as to weight and grade, requiring extrinsic evidence to enable the court to reach a proper construction of the contract, there was certainly a direct and proper method by which any such ambiguity could have been explained. Louis Salerno carried on the negotiations, and he must have known the facts. To prove what it claims the parties intended by this contract,

respondent has elected to put in only some evidence about the weight and grade of some cattle which have not been shown to have any connection with this contract. We say this evidence proves absolutely nothing, so far as this case is concerned. If the parties had actually agreed on steers of any particular kind, weight or grade, why did not respondent at least attempt to show it by the obvious direct method of using Salerno's testimony?

It is elementary that an agreement, to be binding, must be definite and certain. It is evident that courts can neither specifically enforce agreements nor award damages for their breach when they are wanting in certainty. Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation are unknown, being neither certain nor capable of being made certain. 12 Am. Jur. 554.

We think the case of *Mason v. Ruffin* (La.) 130 So. 843, is a particularly good illustration of wherein this contract is, under the evidence, totally lacking in that certainty which the law requires, and of the principles which should be applied to this case. Plaintiff sued for balance due on 34 head of steers sold to defendant. Defendant denied any balance due and counter-claimed for damages for breach of the contract for failure to deliver 66 additional steers, claiming the contract was for a minimum of 100 head, of three different classes with a different price for each class. The trial court found for the defendant on the cross-complaint, that the contract requir-

ed a minimum of 100 head, but that there was no specific number of each grade fixed, and that plaintiff could have complied with the contract by delivery of the whole number required of the smallest class, which the court found would have been of an average weight of 600 pounds, and assessed damages on that basis. The appellate court held that the trial court correctly rejected plaintiff's claim because of the breach, but reversed the other findings, saying:

"However, if we took the position of the judge of the lower court that there was an agreement for the delivery of 100 head of steers, we would be unable to award damages for the reason that the amount of damages is too uncertain and indefinite to justify any award. It is shown that there were three classes of steers contemplated, and the alleged contract does not specify how many of either class were to be delivered, neither does it specify what the weights of each class should be. He claims damages based on a sale of 5 cents per pound and there is no way of arriving at an accurate weight of the cattle alleged to have been bought. The lower court stated that the smaller class, which if delivered, would have been a compliance with the contract, would average 600 pounds each. However, there is no evidence to justify such a finding. One witness places the weight of the two year olds, some at 500 pounds and some at 550. If plaintiff had delivered all sixty-six steers of the large classification, it is shown that their weights were from 1,000 pounds to as high as 1,472. If the defendant had sold the steers according to the same

classification that he had agreed to buy them, there would have been something accurate by which to measure his damages; but he claims to have bought the steers by classification, so much for each classification, regardless of weight, and to have sold them by weight only, namely 5 cents per pound all around. The only way that the court could arrive at the weight of the sixty-six steers without proof of their weight, although they were all of the same classification, would be purely and simply by guess, and we are not authorized to do that.

“All damages must be proved with legal certainty * * * * If damages could be allowed in this case for breach of contract, the court is without right to fix the damages for the reason that the proof is too uncertain and indefinite as to amount. There is no way to arrive at the weight of sixty-six head of steers to be delivered and no just or equitable way to estimate the weight.”

The weight and grade of the steers goes directly, of course, to the calculation the court made in assessing damages, and we will discuss the effect of the admission of the evidence in question, and the court's findings thereon, under the subject of damages. We can summarize our position on the question of the admissibility of the evidence on the subject of weight and grade, what it proved or did not prove, and the court's findings thereon, as follows:

1. The contract required only that appellant deliver merchantable “slaughter” steers, and there was no requirement that the same be of any particular weight or grade.

2. The contract was not ambiguous, and it was er-

ror to admit parol or extrinsic evidence that steers of any particular weight or grade were required.

3. Evidence as to the weight and grade of the Peterson and the Wyoming steers was immaterial, and, in any event, did not prove anything as to the weight or grade of steers which should have been delivered under the contract.

4. There is no competent evidence to sustain the court's findings that appellant was required to deliver good quality steers weighing an average of 950 pounds.

III

Did the trial court err in holding that the parties merely modified the original contract, and what was the effect of any change or modification?

Specification of Error VIII is directed to this question, and the correctness of Findings of Fact IV, XIV, XVII, and XVIII, all of which go to the effect of the negotiations between the parties subsequent to the signing of the original contract, is challenged.

That the parties entered into certain negotiations after the original contract was signed can hardly be disputed. There are facts which prove this beyond question, being the letters in evidence as Exhibits 2 and 15, appellant's undisputed testimony that they did negotiate, and the fact that when the \$3,000 draft was delivered to appellant, it showed on its face that it was for a down payment on 240 steers instead of 300. This \$3,000.00 was in the form of a draft drawn on respondent, and not an ordinary bank check.

When respondent honored the draft, it had notice of what appeared thereon, and it thereby ratified the new contract or the modification of the original contract.

The evidence in respect to what was said in these conversations between Salerno and appellant is admittedly not as clear and direct as it could have been. Appellant's testimony at times was not entirely responsive, and tended to state conclusions instead of giving the conversations verbatim, but the essential facts appear quite clearly and fully therefrom. There was some discussion concerning appellant's demand that the three per cent shrink provision be eliminated. (Record, page 155). It definitely appears that appellant told Salerno he had not been able to get steers for the contract. The court did not, however, permit him to state why he did not thereafter procure cattle for the modified or new contract. (Record, page 153).

Some further details of these conversations and negotiations appear in appellant's pre-trial deposition, Exhibit 10, which was put in evidence by respondent. It appears therefrom that appellant complained because no money had been put up on the deal by respondent, and that Salerno suggested that he accept the down payment and try to buy some steers during the winter. (Record, pages 95-97).

It appears from the trial court's preliminary or memorandum decision that the court arbitrarily rejected all of this evidence, except what appeared on the draft, Exhibit 16, and thus completely eliminated

the effect of these subsequent negotiations except in the matter of reducing the number of steers to be delivered, although appellant's testimony was not contradicted in any way. (Record, page 165). Appellant contends that was this erroneous and prejudicial.

Considering this action of the trial court in arbitrarily rejecting all of appellant's testimony as to these subsequent negotiations, we think the general rule is as follows: "Uncontradicted evidence should ordinarily be taken as true, and cannot be wholly discredited or disregarded if not opposed to probabilities or arbitrarily rejected, even though the witnesses are parties or interested; and where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to show it." 23 C. J. 47.

While this rule is not followed strictly by all courts, it has been recognized and declared to be the law in Idaho. In *Pierstorff v. Grays Auto Shop*, 58 Idaho 438, 74 Pac. (2d) 171, the supreme court of Idaho announced the rule in the following language:

"The rule applicable to all witnesses, whether parties or interested in the event of an action, is that either a board, court, or jury, must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. (*Manley v. Harvey Lumber Co.*, 175 Minn. 489, 221 N. W. 913, 914). In *Jeffrey v. Trowse*, 100

Mont. 538, 50 Pac. (2d) 872, 874, it is held that neither the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability."

This rule was followed in *First Trust & Savings Bank v. Randall*, 59 Idaho, 705, 89 Pac. (2d) 741, in which the court cites the *Pierstorff* case with approval and states:

"The rule was recently announced by this court that the court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or the trial and that the trial court may not arbitrarily or capriciously disregard the testimony of a witness unimpeached by the any of the modes known to the law, if such testimony does not exceed probability."

The rule is followed by most federal courts. *Alabama Title & Trust Co. v. Millsap*, 71 Fed. (2d) 518; *Weicker v. Bromfeld*, 34 Fed. (2d) 377; *Gibson v. Southern Pacific Co.*, 67 Fed. (2d) 758.

All of the elements of the rule appear in this case. The testimony of appellant was uncontradicted. There is nothing inherently improbable about it—in fact it appears most reasonable and probable in the light of the particular circumstances that Salerno knew the steers would have to be purchased and that they would not be placed on appellant's ranch until the following spring. Certainly respondent had

ample opportunity to contradict this evidence if it was not true, as its agent, Salerno, was present in the courtroom throughout the trial. He was the other party to the negotiations, and he knew what was said.

The effect of this evidence, had the trial court given it the credence to which appellant was properly entitled, goes far beyond a mere modification of the original contract. It shows what amounts to a complete abandonment thereof, and the substitution of an entirely new agreement.

It is elementary that it is competent for the parties to a written contract, by parol, to altogether waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make a new one. 12 Am. Jur. 1006.

It is also well settled that a contract need not be rescinded by an express agreement to that effect. The parties may impliedly rescind it by making a new contract inconsistent therewith. 12 Am. Jur. 1013.

There is substantial authority to the effect that modification of an executory contract has the legal effect of creating a new contract. *Pleasant v. Arizona Storage & Dist. Co.*, 34 Ariz. 68, 267 Pac. 794; *Hawkeye Clay Works v. Globe & Rutgers Fire Ins. Co.*, 202 Iowa 1270, 211 N. W. 860. 17 C. J. S. 868.

In any event, whether the original contract should be considered as merely modified, or whether it should be considered as entirely abandoned by the substitution of a new agreement, the trial court's

findings are inconsistent with the only evidence on the subject. The only evidence as to what took place during these subsequent negotiations was the testimony given by appellant. The only explanation as to why the down-payment draft was made to show it was for a different number of steers than the number called for by the contract was the explanation given by appellant. The trial court did say, in its memorandum decision, that it was resolving certain doubts touching on these negotiations against respondent, because of respondent's failure to interrogate Salerno. (Record, page 167). At the same time, the court says it does not believe appellant's testimony except where it is fully corroborated by other evidence. (Record, page 166).

Of course, the trial court could not wholly ignore the effect of the 240 figure on the draft, because it was there in black and white. The court says it will not believe appellant's explanation of why it was put there. Salerno, the man who put it there, offered no explanation. As a result, the court, in effect, made its own explanation—one which is inconsistent with neither appellant's explanation nor with the inferences which arise from the failure of respondent to offer any other explanation.

When all the evidence is considered, and the uncontradicted testimony of appellant is given the effect to which it is entitled by law, the only correct finding would be that the original contract was abandoned by substitution of a new one. Even under a finding that the contract was modified; respondent

could not maintain any action on the contract as it originally existed. It is well settled that no recovery can be had where the cause of action, pleaded in the petition, rests upon one contract and the evidence in support of plaintiff's case discloses another and a different contract.

The case of *Ross-Saskatoon Lbr. Co. v. Turner*, (Mo.) 253 S. W. 119, illustrates this principle. The court specifically states that where a contract has been modified, the party suing thereon must plead and stand upon the contract as made by the modification.

In *Koons v. St. Louis Car Co.*, (Mo.) 101 S. W. 49, the court states that where an original contract is modified and varied by a subsequent oral agreement between the parties, the whole matter is thrown into parol, and in order to recover upon such modified contract, the contract as so modified must be distinctly pleaded.

In *Adkins v. Pikeville Supplying and Planing Mill Co.*, (Ky.) 295 S. W. 440, it was held that where an original contract, though modified by subsequent contract is not entirely superseded by subsequent modification, it, together with modification, constitutes the basis of action for breach, and both must be pleaded.

There are many other cases which illustrate the rule, but it is so universally recognized that it seems unnecessary to pursue the matter further.

Respondent has at all times insisted on performance according to the original contract without re-

gard to any subsequent modification. Its demand for delivery was for the full 300 head, and was accordingly an improper demand. (Exhibit 7. Record, Pages 130, 139). Respondent's complaint is based solely on the original written contract without respect to any modification.

In this situation, when the evidence disclosed such a material change in the original contract, appellant was entitled to a dismissal or non-suit. At the very least, respondent should have amended its complaint to conform to the evidence, in which event all details of the modified or new agreement could have been fully shown. Respondent would have the burden of showing all the facts in order to prove its case.

As it is, there is substantial evidence in the record, which stands uncontradicted, that there were other changes in the original contract in addition to the reduction in number of steers. The trial court had no right to arbitrarily reject this evidence.

It was not incumbent on respondent to prove more than that the original contract was so changed or modified that no cause of action could be predicated on the contract as it originally was written. The trial court necessarily found there had been one substantial change, at least. Accordingly, the complaint being based on the contract as it originally stood, no recovery should have been allowed when the proof showed the cause of action declared on no longer existed.

IV

Did the trial court err in refusing to allow appellant to impeach the witness Louis Salerno?

The question arises from Specification of Error IX.

Louis Salerno was respondent's chief cattle buyer, and he conducted all negotiations with appellant, both before and after the original written contract was signed. The contract was prepared from his directions. (Record, pages 125, 126, 128).

We have heretofore discussed some of the circumstances which attended the execution of the original contract. We have showed that appellant did not have the cattle for the contract and that Salerno knew this to be the fact. Nevertheless, he directed the placing in the contract of the recitals that the steers were on the ranch, branded in a certain manner. We have also shown that he did not regard the deal as closed by the mere signing of the contract, as appears from his letter, Exhibit 15, and from his subsequently entering into negotiations with appellant which resulted in at least a modification of the contract.

Respondent made no direct attempt to identify any particular steers as the subject matter of the contract, nor did it offer any direct evidence as to just what kind of steers the parties had in mind. It merely offered the contract in evidence, and thereafter sought to give the trial court a basis for calculating damages by the evidence relative to the Peterson steers and the Wyoming steers, without, how

ever, making any direct attempt to show that such steers had any connection with the contract.

The question naturally arises, "Why did not the respondent call its chief cattle buyer, the man who handled all of negotiations on its behalf, and thereby identify the cattle covered by the contract and give pertinent evidence as to the weight and quality of the cattle?" If the contract was ambiguous, as the trial court ruled, why did not Salerno testify that the Wyoming cattle, or the Peterson cattle, or some other particular herd of cattle, were the subject matter of the contract, or at least testify that the parties had agreed on cattle of some particular weight and quality for the contract? Why did he not deny the testimony of appellant concerning their negotiations between the time the contract was signed and the payment of the \$3000.00? Why did he not refute appellant's testimony as to appellant's offer to purchase cattle on the market to fill the contract? Why did respondent refuse to call this employee as a witness?

The conclusion is inescapable that respondent dare not call Salerno to the witness stand and submit him to cross-examination by appellant. Respondent was trying to prove indirectly that the Wyoming cattle might be the subject-matter of the contract, and respondent was trying to avoid or conceal any evidence of the modification or abandonment of the original contract. If Salerno had admitted on cross-examination that the Wyoming cattle were not covered by the contract, all of respondent's evidence concerning them and their sale at the Idaho Falls

Livestock Auction Company's sales yard would have been immaterial and stricken from the record.

It is reasonable and permissible under the law, to presume that Salerno's testimony would have been unfavorable to respondent's case. As a matter of fact, we believe Salerno could not have avoided admitting the Wyoming cattle were not the contract cattle. We believe he would have admitted the original contract was modified in other respects than merely reducing the number of steers to be delivered. We believe he would have had to admit that appellant did offer to fill any obligation he was under to respondent by obtaining steers on the market and delivering them.

With respondent resorting to such indirection and apparent concealment, appellant felt that the actual facts, not mere inferences, should be shown, and appellant put Salerno on the stand and tried to get at the truth. He was a hostile witness, however, and when he became evasive, appellant attempted to impeach him through his pre-trial deposition and compel him to divulge the facts. The trial court, however, erroneously "rung down the iron curtain", and the witness was protected by this ruling and by his employer. (Record, page 129).

Rule 26(d) (1) of the Federal Rules of Civil Procedure is clear and direct. The rule states:

"Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

The trial court's ruling was directly contrary to

the rule. We have not found any cases where any question has arisen under this rule. Indeed, the language of the rule is so clear that it is difficult to see how the question could arise. In discussing the rule, Moore's Federal Practice, Vol. 2, page 2487, has this to say:

"Rule 26(d) (1) permits a party to use any deposition, whether of a party or other person, for the purpose of 'contradicting or impeaching the testimony of the deponent as a witness' irrespective of whether the witness is the party's own witness or the witness of some other party. This slight relaxation of the rule against impeaching one's own witness is in accord with the best modern authorities on that subject."

Moore then points out that when read with other portions of Rule 26(d), the word "contradicting," as used in the rule, is synonymous with "impeaching."

The trial court therefore erred in its ruling. That the error was prejudicial becomes apparent when the situation is fully considered. Appellant could not, under the rules, cross-examine Salerno as an adverse party. Naturally appellant could not risk being bound by the testimony of this hostile witness, and his only insurance against such a result was his right to impeach the witness if he did not testify truthfully and in accord with his deposition.

The ruling foreclosed appellant from pursuing his inquiry into these very vital and important matters. If, as appellant contends, Salerno knew the recitals as to location and brand were not true when he put them into the contract, appellant had the right to

make him explain why he put them there. If there was any actual ambiguity in the contract of the nature held by the trial court, appellant had the right to make him explain whether or not any particular herd of steers was intended, or if that was not the case, whether or not the parties had agreed on any particular kind, size, grade, or type. If there was any such ambiguity, it was of Salerno's making, and it came about only because he put these recitals in the contract when he knew they were not the fact. Appellant had the right to his explanation, and to see that it was a truthful one. And if appellant had made him an offer to settle the controversy by getting steers on the market and delivering them, appellant had the right to make him tell the truth about that. Of the utmost importance, appellant had the right to make him tell just what took place during the negotiations between him and appellant after the contract was signed, just what was agreed upon, and whether or not the contract was merely modified or if it was completely abandoned and a new agreement reached. In short, appellant had the right to make him tell the facts, and all the facts, about the matters in issue in this case. The only insurance appellant had that he could be made to tell the truth was by using his pre-trial deposition to impeach him if he did not. When the trial court ruled that could not be done, appellant could no longer pursue such inquiries except at the risk of being bound by the untruthful testimony of a hostile witness.

The consequences are evident. The trial court said

it would not believe anything appellant testified to except where it was corroborated by other evidence. Necessarily, then, what the court did find is based only on inferences instead of direct evidence. The court's attitude in protecting this witness changed the whole course of the trial. The ruling was prejudicial error.

V

Did respondent suffer any damages, and if so, are the same recoverable under the evidence in the case?

Specifications of Error X and XI are both related in this question, and will be discussed together. Appellant challenges the correctness of Findings of Fact VIII, XII, XX and XXII.

Respondent sought to prove its alleged damages by showing the difference between the contract price and the market price at the place and time for delivery under the contract. This is the proper method under the Idaho law.

The only evidence on the market prices was given by respondent's witness, Garth Peck. It is not in dispute. According to this witness, the market price for slaughter steers ranged from 16 or 17 cents for lowest grades to 25 or 26 cents for good or better grades. (Record, pages 87-89). The contract price, converted from a dressed weight basis to live weight basis, was 17½ cents for steers grading A grade, price for other grades to vary according to difference between Buyer's market price for "A" grade and the grade of such steers grading other than "A"

grade.

The trial court found that the contract required good quality grade, worth 25 cents on the market, and assessed damages on the basis of the difference between $17\frac{1}{2}$ cents and 25 cents, or $7\frac{1}{2}$ cents per pound. It also found that the average weight of the steers required by the contract was 950 pounds.

We have already discussed the court's findings in these respects. If our position is correct that all that could have been required was slaughter steers, it follows that respondent has not proved that it suffered any actual damages, because under the only testimony in the case, slaughter steers could have been obtained at or below the contract price from the market, and there is no evidence of the difference between Buyer's market price for "A" grades and other grades.

We have already cited cases which are authority for the proposition that, where nothing is said in the contract as to grade or quality, all that can be required is that the quality be merchantable or salable. Respondent will no doubt argue that the $7\frac{1}{2}$ cent difference between the contract price and the market price would hold true regardless of grade, but there is no evidence to sustain such contention. The burden of proof was of course upon respondent to prove its alleged damages. It offered no evidence of the difference between "A" grade steers and its market price for other grades, and accordingly there is nothing upon which any determination in respect thereto can be based. It follows that there is no basis

for any contention that the damages would be the same regardless of grade.

The matter of weight is of even more importance in the determination of damages. We have also discussed the reasons why the trial court's finding of a specific weight cannot be sustained under the evidence in the case, particularly with respect to the figure found by the court. It is quite obvious that the matter of weight is an essential element upon which damages, if any, would have to be calculated.

We recognize the rule that where there is proof, within the permissible range of certainty, a plaintiff should not be denied recovery because of the difficulty in accurately measuring the damages. What we do say is, that in this case, the proof does not fall within the required permissible range of certainty.

The rule which allows recovery in spite of the difficulty of proving damages with certainty does not mean there need be no proof of the amount. Obviously, a plaintiff may not come into court and say no more than "the defendant stole some of my wheat", or "the defendant did not deliver some goods he agreed to deliver." It is required, that an injured plaintiff must produce the best evidence available, and if that is sufficient to afford a reasonable basis for computing his loss, he will be allowed a substantial recovery, notwithstanding the exact amount of damages is incapable of ascertainment.

Here we say the respondent has not procured the best evidence obtainable, nor, for that matter, any competent evidence at all. The Peterson steers were

never shown or even claimed to be connected with the contract, nor were the Wyoming steers that were sold at Idaho Falls, in spite of what the trial court said about them in its memorandum decision. Neither did respondent adduce any evidence as to what size, grade, or type of steers were contemplated, although such evidence would have been properly admissible if there was any actual ambiguity in the contract, and Salerno could have testified thereto.

We have shown that the 950 pound figure reached by the trial court came out of thin air, and that there is no mention of any such figure in the evidence, including the evidence relative to the Peterson and the Wyoming steers. And if we are correct in saying that there is no basis for the 950 pound figure, this leaves the case in the condition that there is no reasonable basis in the evidence upon which the court can estimate, within the ordinary requirements of certainty, the damages sustained, and the findings relative thereto are no more than mere guesswork, which the law cannot sanction.

We have already referred to and discussed the case of *Mason v. Ruffin*, 130 So. 843, which illustrates exactly what we are here saying.

In *Shannon v. Shaffer Oil & Ref. Co.*, 51 Fed. (2d) 878, the action was for damages for alleged breach of contract arising by way of waste of gas from an oil well. Plaintiff failed to avail himself of defendant's records relative to the well, leaving the evidence as showing only that an undetermined quantity of gas did escape. It was held that, while plain-

tiff could not be denied recovery because of difficulty in ascertaining the exact amount, if it was proved that his rights had been invaded, there could be no recovery permitted unless there was sufficient evidence produced to afford a reasonable basis for estimating his loss, and that he had failed to produce such evidence, although it was available to him. That is exactly what we have in this case, plaintiff had available the means of showing, or at least trying to show, just what size and type of steers were contemplated by the contract, through Louis Salerno. It failed to produce his testimony, and it offered no other evidence from which this could be determined.

In *Duelen v. Karon*, 191 Minn. 330, 254 N. W. 433, the court said:

“While it is true that difficulty in assessing damages is not ground for denying the plaintiff relief . . . yet where there is no evidence upon which the jury reasonably could assess the damages, it is error to allow them to return a verdict based upon mere conjecture.”

Damages which are wholly uncertain cannot be made certain by adoption of an arbitrary standard of loss. *Dexter-Portland Cement Co. v. Acme Supply Co.*, (Va.) 133 S. E. 788.

There is a further matter to be considered in determining whether or not respondent is entitled to any damages. Appellant alleged that he had offered to obtain steers on the market and deliver them to respondent at the contract price to satisfy any obli-

gation he might owe to respondent. The trial court held no such offer was ever made. In his memorandum opinion, the court said, "Defendant did not offer to perform the contract, as he claims. In this and in all other phases I place no credence whatever in his testimony."

It is, of course, elementary that if appellant actually did offer to perform, and his offer was refused, there can be no recovery for non-performance.

The question of whether or not an offer to perform was made is entirely factual. Demand for delivery appears to have first been made by Salerno orally. (Record, page 130). In response to this demand, appellant did offer to do certain things. The record shows as follows, on page 158:

Q. Now, what was said and done there, just go ahead with the conversation?

A. He said according to that contract I have got to deliver three hundred head of steers branded with O on the left hip and I argued that the contract didn't say so and he said "Well, I am making demand for three hundred cattle" and I said "I will get the contract and we will read it." I said "what kind of cattle does that say" and he said "steers" and I said "I will go to Denver and buy you three hundred steers and sell them to you for 17½ cents", and he said, "What kind of steers", and I said "Steers as called for in the contract and will sell them for 17½."

This testimony stands uncontradicted.

In addition to the oral testimony, in his letter of August 22, 1947, Exhibit 11, appellant tried to get the

dispute settled by having respondent accept his other saddle at a slightly higher price, but stated in the letter that if this offer was not acceptable, "I will put in other cattle by First of Oct. and get rid of these."

The trial court, as stated, disregarded this testimony, and also ignored the offer in appellant's letter, Exhibit 11, although none of it was contradicted in any way. Again the rule applies that the trial court could not reject uncontradicted testimony, particularly where it is within the power of the other party to attempt to disprove it, if it were untrue. Certainly, if appellant's testimony that he made this offer was untrue, the man he made the offer to, Louis Salerno, was right there in the courtroom to deny it. He did not deny it.

In addition, for the trial court to utterly ignore the statements in Exhibit 11, was a purely arbitrary action and prejudicial error.

We think the evidence shows that appellant did offer to do everything he was obliged to do under the terms of the contract, and when his offer was rejected, respondent is barred from asserting any claim for damages for breach of the contract.

VI

Did the respondent fully perform the terms of the contract on its part to be performed?

This question is raised by Specification of Error XII, and appellant here challenges Findings of Fact VI, XIII and XVI.

The trial court found that respondent fully per-

formed all of the conditions of the contract on its part to be performed. It found that respondent paid the \$3,000.00 down payment on account of the steers covered by the contract, and that there was no failure of consideration.

Most of the factual matters relating to these findings have been incidentally referred to in discussing other questions. The facts themselves are not in much dispute, only the interpretation thereof.

Looking at the contract document, the primary obligation on the part of respondent was the payment of the purchase price, as is the case in most executory contracts of sale.

The contract recites: "The Buyer herewith pays to the Seller, receipt of which by the Seller is hereby acknowledged, the sum of Three Thousand (\$3,000.-00) Dollars, as partial payment upon the purchase price of said steers."

We have pointed out that no such payment was actually made at the time the contract was signed, and that no payment of any kind was made until five or six weeks later. We have also shown that when a payment was made, it was in the form of a draft which showed on its face that it was for a different number of steers than the number specified in the contract.

The issue is simple, but of much importance. Was the down payment recited in the contract actually made on that particular contract?

The mere recital of receipt of a payment in a simple contract does not prohibit proof that the con-

sideration was never in fact paid. *Kay v. Spencer* (Wyo.) 213 Pac. 571; *Wurdeman v. Waller*, (Cal.) 263 Pac. 558.

Such recitals amount to nothing more than a receipt, and as such are open to explanation by parol testimony. *Jones v. Nelson*, (Wash.) 167 Pac. 1130.

The uncontradicted evidence in this case shows that the only payment which was ever made by respondent was not made on this contract. Not only does the draft by which the payment was made indicate this, but we call particular attention to the direct testimony of appellant on pages 148-149 of the record, and his testimony in his pre-trial deposition on pages 94-95 of the record. This testimony was not contradicted. It was direct and positive that the \$3,000.00 was not paid on this contract. The trial court had no right to reject it, and it must be taken as the fact.

Besides standing undisputed, this testimony is substantiated by other evidence in the case. The parties did engage in negotiations after the original contract was signed, and no payment of any kind was made until after these negotiations were ended.

Why did respondent delay in making the payment for these several weeks? The answer is obvious—no real agreement had been reached.

So far as the original contract was concerned, the payment was never made, and there was as a result a total failure of consideration. By reason thereof, the contract never went into effect. *Kay v. Spencer*,

supra.

The failure to make the payment at the time the contract was signed, and the delay in making any payment at all, are responsible for much of the difficulty the parties are now in. We have previously shown that because no money had been put up, appellant delayed closing his deal with Peterson Brothers, and thereby lost out in getting that particular herd. When the payment was finally made, respondent knew appellant had not yet procured steers for the contract. The payment was made on the understanding that appellant was to try to get steers during the winter. (Record, pages 103, 152-153). Appellant was not permitted to show why he did not thereafter procure steers. (Record, page 153). The trial court was adhering to its view that the original contract was the only contract, and because this was not the case, the ruling was not correct. It is quite obvious, however, that cattle were not thereafter procured because they were not available at that late date. The season run was over.

The contract indicated that the parties expected respondent to do certain other things in addition to the payment of the purchase price. The contract says that "Sellers operations in connection with his caring for, feeding, and for dehorning said cattle shall be subject to Buyer's inspection at any and all times, but Buyer assumes no responsibility in connection therewith." We do not maintain that this places any actual obligation on respondent to make any inspections, but it certainly indicates that re-

spondent could and would do so. It is a matter of common knowledge that cattlemen will drive many miles out of their way just to look at a herd of some other man's cattle, not to speak of their own. Here we have a comparatively small packing company, whose chief cattle buyer undoubtedly must have been within a few miles of the ranch where his company was supposed to have a large and valuable herd, on many occasions, where he was expected and had the right to make inspections, yet during the entire period of nine months after he was supposed to have purchased them, he never went near them, and never made any inquiry as to their condition. It certainly indicates very strongly that neither he nor his company regarded their supposed contract as of any particular force or effect. It also tended to corroborate what appellant said—that the original deal was called off and a substitute agreement made.

If, as we contend, the down payment was never made on the original contract, but was made on another or different deal, there was a complete failure of consideration so far as the original contract was concerned, and there was no contract. The trial court was in error in its findings in respect thereto.

VII

Did the trial court err in denying appellant's motion to dismiss at the close of respondent's case?

This question is raised by Specification of Error XIII.

In our argument on other issues of this case, we

have already discussed most of the facts which go to this question, and it will not be necessary to review them in detail.

In the motion addressed to the trial court at the close of respondent's case, appellant urged as one of the grounds of the motion that the evidence showed the original contract was conditionally delivered, and the conditions never met.

As the evidence stood at the close of plaintiff's case, it showed that appellant had demanded the elimination of the three per cent shrinkage provision. Whether or not this condition was ever met in the subsequent negotiations of the parties is of no great importance. What is important is that the evidence shows conclusively that because this demand had been made, it caused the parties to enter into negotiations after the original contract was signed, which resulted in at least one substantial change.

We think the evidence when respondent rested its case shows also the existence of the second condition precedent that it was understood the contract was not to be in effect unless and until appellant procured steers for it. Appellant had then testified that Salerno knew he did not have the steers at the time the contract was signed. (Record, page 35). The evidence also showed that no payment had been made on the original contract, and that the original contract had been more or less disregarded (Record, pages 94-97). The evidence further showed that Salerno knew no cattle had been purchased at least a

month after the contract was signed (Record, pages 102, 103). The evidence showed Salerno and respondent agreed to a different number than the original contract specified (Record, page 103). The evidence showed no down payment had been made at the time the original contract was signed (Record, page 103). All of these things put together show that there was no actual delivery of the original contract because it was subject to this condition.

It will no doubt be argued, that even if there were any conditions, they were waived when appellant accepted the down payment. This does not follow, because the evidence shows, and the court necessarily had to find, that the payment was on a modified or different deal. No down payment was ever made on the contract as it originally stood. The only reason it was not made was because these conditions did attach, and the evidence so showed when the motion was made.

The next major element which was called to the attention of the trial court was the lack of identity of the subject matter of the contract. It will no doubt be argued that when respondent states, as we have stated, that the contract, on its face appeared certain and unambiguous, appellant cannot, through parol or extrinsic evidence, inject uncertainty or ambiguity. However, it was not appellant but respondent who injected the ambiguity and uncertainty when it adduced evidence about the Peterson and Wyoming steers, as the record will show.

As we have said, the recitals in the contract on

their face, appear to completely identify the subject matter. Respondent itself, however, showed that there were no such steers as described in the contract (Record, page 21). Respondent then immediately commenced interrogating appellant about the Peterson steers. The only possible reason for evidence concerning other steers was because uncertainty or ambiguity arose when respondent showed there were no steers in existence as described in the contract.

Respondent not only injected the uncertainty as to the subject matter into the case, but it is responsible for there being any uncertainty in the first place. Respondent drew the contract, and it put these recitals in the contract from which the uncertainty arises, and it put them there knowing they were not true.

Under ordinary circumstances, after producing the contract and showing default in delivery, it would complete its case by showing what were the weight and grade of the steers described and identified in the contract, and showing the market value thereof.

Why, then, did respondent adduce evidence about steers other than those described in the contract? It was because, having shown the steers described in the contract did not exist, respondent had to give the court some basis to calculate the alleged damages. We think the evidence as to these other steers proves nothing so far as this contract is concerned. The man who could have told the court what kind, grade and weight of steers the parties agreed on, Salerno, was not called as a witness by his employer, although

he was present in court.

As the evidence stood when the motion was made, the subject matter of the contract completely lacked identity. It follows that there was no basis for the court to assess damages, except speculation and conjecture.

The final element called to the trial court's attention in the motion was that the evidence showed plaintiff had failed to perform the contract on its part. This, of course, refers to the making of the down payment. At the time the motion was made, the evidence showed that the payment was not made at the time the contract was signed, or on that contract at all, and the only payment ever made was on a different deal.

We respectfully submit, as the evidence stood when appellant moved for a dismissal, the motion should have been granted.

VIII

Appellant did not receive a fair trial.

A brief analysis of the memorandum decision shows that the trial court adopted an incorrect theory of the case, and appellant did not get a fair trial.

The Court says it is of the opinion that the written contract was a binding agreement, unconditionally delivered, or if its delivery was conditional that the condition was waived. We think this conclusion was reached because the court considered that only one condition attached—the elimination of the three per cent shrink provision. The court felt that any attempt to show that the contract was to be in force

only when the steers were obtained would be to vary the written instrument by parol evidence (Record, pages 141-142). As we have shown, this was an incorrect view and appellant was entitled to adduce evidence to that effect. The matter was properly pleaded.

As a result, only part of the material and pertinent facts which underlaid the whole course of dealing between appellant and respondent were brought to light, and the nature of this case is such that no fair decision could be reached without all the facts. There is enough in the record to show that what appellant sought to prove in this respect would have been well substantiated by what took place after the original contract was signed. This is demonstrated by considering how differently the whole situation would look if this evidence had been received.

The purposes underlying this deal are quite evident. Respondent wanted some young steers put on feed for about ten or twelve months under care of a good cattleman. It knew appellant and knew his ranch. He did not have any such steers and would have to buy them. They agreed to make a contract. The contract could have no meaning until the steers were obtained and it would naturally be so understood and agreed. When the contract was submitted to appellant it contained some things he did not like, so he demanded some changes. No down payment was made, and he naturally determined to wait until these matters were adjusted before buying the steers. Negotiations followed, and some-

thing different was decided on. Whether the result was a new agreement or a modification of the old one, it could have no meaning until the subject matter was obtained. And at that time of the season, whether or not steers could be obtained might be in doubt. When appellant tried to show these facts, he was foreclosed by another erroneous ruling of the court (Record, page 155). Appellant was thus foreclosed from showing, not only that the original contract was subject to this understanding that the steers would have to be obtained, but that the subsequent agreement was also on the same basis.

Respondent sought to conceal the fact that there were subsequent dealings after the original contract was signed, and that there was any modification or change. It offered no evidence with respect thereto. Appellant was permitted to show only a part. Nevertheless, with only part of the facts, the trial court undertook to make findings that the parties did subsequently modify or change the original contract, and to say what they agreed to. The result of such attitude is apparent and what could be expected. The Court has made the agreement, not the parties, and the agreement the Court made is far different from what the parties intended and agreed upon.

We think it was because the trial court erroneously refused to admit this evidence that he refused to give credence to appellant's testimony on other matters. The excluded matters were so closely tied in with what happened all the way through between Salerno and appellant that it was extremely diffi-

cult for appellant to give a clear account of other matters. It would only be through getting at all the facts that appellant's position would be made clear and convincing.

It was because the trial court felt the contract was complete and binding, and regarded by the parties as such, that the court disregarded the only direct testimony in the case and found the Wyoming steers were the steers referred to in the contract. It was error on error.

If we had the facts, and all of the facts before the trial court the trial court would not have had to resort to reading "between the lines," as the court admits it did (Record, page 167). Appellant should be granted a new trial, under such conditions that all the facts will come to light.

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—vs.—

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Appellee.

Brief for Appellee

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EASTERN DIVISION.

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Ogden, Utah

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FILED
APR 20 1947

WILL F. O'BRIEN,

CLERK

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Since this appeal is predicated largely upon appellant's contentions that the findings of fact of the lower court are without support in the evidence, a brief resume of the evidence may be helpful. More detailed consideration will appear in the argument.

Prior to November 4, 1946, appellant approached appellee, through its livestock buyer Louis Salerno, in the matter of the purchase by Appellee of some steers (Record, 136). Following negotiations between the two, appellee's attorney prepared the contract that was received in evidence as Exhibit 1. On or about October 31, 1946, two copies of the contract were mailed by Mr. Salerno in Ogden, Utah, to the appellant at Irwin, Idaho. One copy had been signed by appellee's Vice-President and General Manager, E. W. Fallantine, on behalf of the appellee. (Record, 137). Accompanying the contracts so mailed was a letter from Mr. Salerno, which letter was received in evidence as Exhibit 13, and which letter was as follows:

"Oct. 31, 1946

Bert Ruud
Irwin, Idaho

Dear Sir:

Enclosed is contract on 300 steers. You will note that I have used 29.66 as the purchase price as this is the ultimate dressed weight cost on cattle that cost 17.50 alive and yield 59%.

If there is any part of this that you don't understand please call or write me and I will try and explain same.

If it is satisfactory please sign it and mail back, and we will send you a check for \$3,000.00.

Yours truly,

/s/ LOUIS SALERNO."

On or about November 4th, 1946, appellant signed the contract and returned a copy so signed to appellee. The one he returned did not have Mr. Fallantine's signature thereon, as he *requested* that the same be signed in his accompanying letter. Accompanying the copy so returned to appellee was appellant's letter to appellee's agent, Mr. Salerno, dated November 3, 1946, received in evidence as Exhibit 2, and reading as follows:

"Irwin, Idaho
Nov. 3, 1946

Louie Salerno
Ogden, Utah

Dear Sir:

I am enclosing the contract signed but *would like* the place in paragraph four (4) where you recite that you will shrink the warm carcass 33% three per cent as this part of our verbal agreement was not agreed on and if this was allowed and me deliver the cattle to plant it would amount to roughly \$10, per head and the yield would be lowered to cut the price also.

As I understand the price of 29.66 on a yield of 59 will also apply to a yield of higher or lower as we agreed on that is if the cattle yield 60 the price would raise according and if they yield 58 the price will lower the same way.

I will sign the contracts but kindly erase the 3% shrink on hot weight as this will cost me

roughly \$6 per head and I think that I should be allowed hot weight when I deliver the cattle and guarantee 59 and A Grade and *I also have the best bunch of steers I ever fed. Have sorted all the rough ones and large off steers out have two bunches to receive but the snow storm delayed some but will get them soon.*

Kindly sign the Copy and mail check to me at Irwin when and if you can at once I may be at the Falls Wed. and you can hand it to me there *will be at Jackson with the cattle until then.*

Yours truly,

Bert Ruud

BERT RUUD /s/'' (*italics added*)

In the copies of the contract forwarded to appellant on October 31, 1946, the date was blank as well as the brand description of the steers covered by the contract. The brand description "O L Hip", (meaning O on left hip) was inserted in the contracts by the appellant at the time he signed them. He probably also inserted the date as November 4th, 1946, although he was a little uncertain as to this (Record, 20).

In his letter of November 3, 1946, which accompanied the contract signed and returned by defendant, defendant *requested* plaintiff to sign the copy he was returning. He also requested a modification of the contract as executed to eliminate the shrinkage provisions. He followed this up with a letter of November 12, 1946, received in evidence as Exhibit 14, in which he suggested the provision as to shrinkage be modified to reduce the percentage from 3% to 1½%, rather than com-

plete elimination, as suggested in his letter of November 3rd. The experience of the packing industry generally is that the shrinkage in weight in cooling is 3% (Record, 119).

Mr. Salerno on November 15, 1946, replied to appellant's letters advising in substance that the shrinkage provision could not be modified, (Exhibit 15). No other correspondence passed between the parties until the following August. These August letters will be referred to presently.

On or about November 29, 1946, Mr. Salerno left at the Rogers Hotel in Idaho Falls, Idaho, a draft payable to appellant in the amount of \$3,000.00 (Exhibit 16). Appellant received the draft, cashed it in early December, 1946, and retained the proceeds of the same until the following September, and after demand had been made upon him for delivery under the contract, when he attempted, through his attorney, to repay the amount thereof (Exhibit 8). On the draft was a notation that it related to "240 or more" steers, and from this the court found the parties had mutually agreed to reduce the number of steers appellant was obligated to deliver from 300 to 240.

At the time the contract was signed, appellant, according to his testimony (Record, 141) had no cattle whatever on his ranch at Irwin, Idaho, which ranch is on the Wyoming line (Record, 20). However, according to his further testimony, he had all kinds of cattle across the line in Wyoming (Record, 144) including steers having had a paint brand O on their left hip, placed

thereon by appellant himself (Record, 147, 148), and which steers, appellant had stated, had been sold under contract for delivery the next year. They were of good quality, and appellant said he wanted to put as much gain on them as possible (Record, 47, 57, 61). The steers so branded would have weighed, under normal feeding conditions, 925 to 1000 lbs., in August and September, 1947. (Record, 51). Some of the steers so branded O on the left hip also had the °V° brand belonging to Bruce Porter of Jackson, Wyoming, and other brands registered in the names of a Mrs. Grismer, Wayne Ricks and others the witness could not recall. Subsequent testimony of the brand inspector John Smith developed that the Grismer brand was nnv, the Porter brand was °V° and the Ricks brand was $\frac{N}{N}$

On or about August 6, 1947, appellant sold at Idaho Falls, in the name of his son, Max Ruud, 9 head of the °V° steers (Bruce Porter brand) which 9 head had an average weight of 1,037 lbs. each, and for which he received an average price of 24.09 cents a lb. (From Exhibit 3). Appellee bought and paid for them (Exhibit 4). On September 10, 1947, he sold at Idaho Falls 149 head, which had an average weight of 1,037 lbs. each, and for which he received an average price of 25.85 cents a lb. (From Exhibit 5). On September 11, 1947, he sold at Idaho Falls 1 steer which weighed 845 lbs., at a price of 24 cents a lb. (From Exhibit 5, second page). On September 17, 1947, he sold at Idaho Falls 26 head which had an average weight of 1,108.6 lbs. each, and for which he received an average price of 25.38 cents a lb. (From Exhibit 6). The brands on the steers so sold on these

three dates were similar to those borne by the steers appellant owned at the time the contract was signed and which were then being fed by the witness Robertson, and which at that time bore the paint brand O on the left hip, being the brand described in the contract.

The sale of the 9 head at Idaho Falls, as appellant marketed them in the name of his son, Max Ruud, apparently invoked considerable comment as to whether appellant was disposing of the steers he had contracted to appellee. As no bill of sale from the former owner was presented, the brand inspector, J. J. Smith, refused to release the proceeds to appellant, and shortly thereafter the brand inspector had a conversation with appellant relative to the 9 head. In the course of the conversation appellant told the brand inspector in substance that the 9 head were not part of the steers he had contracted to appellee, but those steers were still on his ranch (Record 45).

Following the appearance of the 9 head on the Idaho Falls market, Mr. Salerno went to appellant's ranch to request delivery of the steers covered by the contract. Appellant said in substance that he didn't have them (Record 130, 188). A few days later Mr. Salerno went back again, with the same result. Appellant then, and under date of August 22, 1947, wrote appellee a letter (Exhibit 11) as follows:

Bert Rudd vs.

“Irwin, Idaho

Aug 22, 47

American Packing and Provision Co.

Ogden, Utah

Attn: L. Salerno

With reference to our different talks on this cattle contract wish to submit the following to *try to fill the contract.*

Inasmuch as we did not get the cattle referred to in the contract I am willing to let you have *the cattle we have at the ranch* delivered at Ogden and weighed off Trucks at *19 cents per lb* and ship only what will grade A or better and you can grade there here or I will sort them as we ship them and you can start to take them any time now and string them out as you wish.

As I have explained to you these cattle stand me this much and *as the prices rose so fast after we made the deal* and so many cattle that I expected to fill this deal with went back on their deal and I did not get them as I explained to you when here, and therefor, I am willing to let you have these at cost or if you cannot use them at that I will put in other cattle by First of Oct and get rid of these.

You have never seen these steers yet *only in the 9 head that you purchased in Idaho Falls* that were my son's and the balance will *compare to them only they are getting better each day.*

Yours truly

Bert Ruud

BERT RUUD /s/'' (*italics added*)

Appellee on August 26, 1947, replied to this letter by making formal written demand for delivery of the steers (Exhibit 7). On August 28, 1947, appellant wrote appellee (Exhibit 12) as follows:

“Irwin, Idaho
Aug 28 47

American Prov Packing Co.
Ogden

Referring to your letter of Aug 26, 1947, will say that I *have* no steers of the description set forth in contract and have explained why.

The steers I offered you in my letter of the 22nd will more than compensate you in that they will weigh twice as much per head will produce more beef and will be worth more to you than *the steers described in contract.*

I therefor offer these to you *in settlement of contract as set forth in letter of 22nd* as I would have been able to make money *had I filled the contract* as set forth but the cattle I offer are worth at least six cents per pound more than I offered them to you on the market.

Yours truly

Bert Ruud

BERT RUUD /s/'' (*italics added*)

Thereafter, and under date of September 11, 1947, Mr. Albaugh, as attorney and agent for apppellant, wrote appellee (Exhibit 8) as follows:

"P. O. Box 428

Phone 326

RALPH L. ALBAUGH

Lawyer

201-205 Rogers Bldg.

Idaho Falls, Idaho

September 11, 1947

American Packing & Provision Co.

Ogden, Utah

Gentlemen:

Last November you gave your check to Bert Ruud for \$3000.00 as an initial payment under a purported contract of sale for 300 head of steers.

I have advised Mr. Ruud to return this money to you, together with interest at the legal rate of 6% from the time he cashed your check. He informs me that he cashed your check in December, 1946, and we have included interest for nine months. Enclosed you will find Mr. Ruud's check for \$3,135.00.

Very truly yours,

RALPH L. ALBAUGH /s/

Ralph L. Albaugh'' (*italics added*)

The price to be paid for the steers covered by the contract was on a dressed weight basis of 29.66 cents per lb., for Grade A's, with adjustments up or down

for those that might grade higher or lower. This was computed upon a live weight price of 17.5 cents per lb. (Record 29), with a yield of 59%. It takes good quality steers to yield 59% (Record 116). By "percentage of yield" is meant the percentage dressed weight bears to live weight. To convert a live weight price of 17.5 cents per lb. into a dressed weight price on the basis of a 59% yield the mathematical formula is to divide the live weight price of 17.5 cents by 59, with the result of 29.66 cents. To convert from dressed weight to live weight on the same basis, you multiply the dressed weight price of 29.66 cents per lb. by 59%, with the result of 17.5 cents. (Record 116-118).

The market value of good quality slaughter steers at Ogden, Utah, during August and September, 1947, was 25 to 26 cents per lb. live weight (Record 87).

No steers were delivered under the contract (Record 116).

Appellant testified that in late September, 1947, he told Mr. Salerno he would go on the Denver market and buy 300 steers and deliver them to appellee at 17.5 cents per lb. (Record 158).

Salerno denied this and testified that the only offers ever made were embodied in the letters Exhibits 11 and 12, above set out in full (Record 139-140). By these letters appellant sought to settle his obligations under the contract by delivering an unspecified number of steers at a higher price than the contract obligated appellee to pay.

The trial court found the contract a valid and binding obligation, which appellant had breached by his failure to deliver. It found the market value of the steers at the time delivery should have been made at 25c per lb. live weight, as compared to the contract price of 17½c, and that appellee's damages was the difference. It found the weight of the steers at the time delivery should have been made at 950 pounds each. It found the contract, subsequent to its execution, to have been modified to reduce the number of steers appellant was obligated to deliver from 300 to 240. It concluded appellee's damages per undelivered steer to be 7½ cents multiplied by 950 (pounds), or \$71.25, and granted judgment on the basis of 240 steers at \$71.25, or a total of \$17,100.00 damages. Judgment was also granted for the \$3,000.00 down payment.

ARGUMENT

Threaded throughout appellant's entire argument is the complaint that the trial court found the facts contrary to his contentions, and that this court should review the evidence, find facts therefrom contrary to the lower court's findings, and thus reverse the lower court's decision.

That such is not the province of this court is fundamental. The findings of fact of the trial judge, based in part upon oral testimony, will be viewed in the same manner as would be a verdict of a jury, and those findings are to be accorded the same conclusiveness, weight and binding effect as a verdict of the jury. Findings of fact will not be disturbed on appeal unless they are

clearly contrary to, or plainly, flagrantly and indisputably against the evidence.

U. S. vs. Jefferson Electrical Mfg. Co., 291

U. S. 386, 78 L. ed. 859.

3 Am. Jur. 459.

We now consider appellant's several points seriatim, demonstrating that there is no reversible error in the record of this case.

I

Did the trial court err in denying appellant's offer of proof that the contract was conditionally delivered?

Appellant's contention is that delivery of the contract was based upon two conditions (a) that the provision therein contained for a 3% shrinkage be eliminated; (b) that it was agreed that the contract was not to take effect unless and until the appellant procured steers for the contract from other parties..

The trial court found against appellant on both these contentions—finding the contract was unconditionally delivered, and further finding that if any conditions were attached to the delivery, such conditions were waived by the appellant (Findings XV and XXI, Record 176-177).

That there was an actual manual delivery of the written contract is without dispute. That legal delivery was likewise effected, was established by the evidence.

The parties both signed the written agreement embodying mutual engagements, and copies thereof were received and retained by each.

The initial words of the contract are "This agreement, *made* this 4th day of November, 1946." The use of the word 'made' imports the completion of the contract. In the Idaho case of Ellwing v. Mullen, 38 Pac. 404, the Idaho Supreme Court held:

"The term 'made and executed' as often used, means a completion of the transaction to which it refers, and when applied to a written instrument, imports, *not only the signing and acknowledgment thereof, but also a delivery of the same.*" (*italics added*).

More, however, than a mere importation or presumption of delivery is present in this case. Let us examine the evidence in the light of appellant's specific contentions:

(a) *As to the shrinkage provisions*: Appellant signed as his free, voluntary and solemn act the written contract as introduced in evidence. He returned the contract so signed by him to appellee by mail, accompanied by a letter (Exhibit 2, Record Page 27) requesting appellee to sign the contract and to mail or deliver him a check. True it is, that in the same letter he said he would *like* the shrinkage provision eliminated, and he requested the erasure of the shrinkage provision, but at no time did he assert, or even intimate, that the contract was conditioned upon its elimination. Rather it

is obvious that what he was seeking was a modification of the contract as made, and he was unsuccessful in obtaining consent to such modification. That the delivery was not conditioned upon elimination of the shrinkage provision is further evidenced by his letter of November 12, 1946. (Exhibit 14, Record, Page 133) in which he suggested the shrinkage be cut from 3% to 1½%. This suggestion was declined by appellee on November 15, 1946, (Exhibit 15, Record, Page 154). The matter was pursued no further, appellant thereafter accepted appellee's check for \$3,000.00 and retained the proceeds thereof until after appellee learned he was marketing steers in his son's name, appellee had demanded delivery, and appellee had advised appellant that the matter would be referred to its attorneys (Exhibit 7).

From the foregoing evidence, the court found that delivery of the contract was not conditioned upon the elimination of the shrinkage provision, and we submit that the evidence is ample to support this finding.

(b) *As to the delivery being conditioned upon his getting the steers from others:* Appellant's contention in this regard is that the trial court precluded him from making proof that he did not, at the time of signing the contract, have the steers covered thereby, and this was a condition to its binding effect. What does the record show in this regard? It shows:

(1) At the time the offer of proof was made, the contract was in evidence, appellant having admitted its execution and manual delivery. In the contract he had

acknowledged having the specific steers covered thereby, and had himself inserted the brand description thereof, O on the left hip.

(2) His letter of November 3, 1946 (Exhibit 2) was in evidence, having been offered in evidence by appellant himself (Record, page 26). In this letter, in referring to the cattle covered by the contract, he described them as "the best bunch of steers I ever fed," and also stated that he had "two bunches yet to receive." It is to be noted that his assertion was that he had the two bunches "yet to receive," not to acquire title to. Also that he would "be with the cattle" until the following Wednesday.

(3) His former employee, Orland Robertson, had testified that at the very time the contract was signed, he himself, as appellant's employee, was caring for appellant's O left hip steers to the number of at least 218 head (Record, page 47-48).

(4) The brand inspector, Smith, had testified that in August, 1947, when checking with appellant about the 9 head that were sold, appellant had told him that the steers he had contracted to appellee were still on the ranch.

In other words, at the very time he signed the contract he had steers branded O on the left hip; he was then referring to them as the best steers he ever fed; and his employee, Orland Robertson, was then caring for them under appellant's direction. Further than that,

appellant himself described the steers covered in the contract, for when the contract was sent to him, the brand description of the steers was left blank, and appellant at the time of signing the contract himself inserted the brand description of the O left hip steers. In the light of this conclusive proof it is small wonder that Judge Healy was disinclined to permit appellant to testify that he did not at the time the contract was signed, have the O left hip steers covered by the contract. To do so would be to permit appellant to testify that the representation he himself embodied in the contract, namely, that he had the O left hip steers, was false and untrue, and also that his reference to the steers in his letter of November 3, 1946, as being the best bunch of steers he ever fed, and that he would be with them, was likewise false and untrue.

In view of these affirmative representations on the part of the appellant, evidenced by his own writings to the effect that he did have the specific steers covered by the contract, it is apparent that his then offer to prove by oral testimony that he did not have the steers was wholly sham and frivolous, and Judge Healy was entirely right in refusing to permit him to so testify. Further, such parol evidence would tend to vary the recitals in the written contract itself.

(c) *Condition precedent inconsistent with written contract:*

We concede without argument the general principle asserted by appellant in his brief to the effect that a

party to contract can prove by parol a condition precedent to the effectiveness of the contract. However, that rule is subject to the limitation that the condition precedent sought to be proved is not inconsistent with the writing itself. In other words, where the condition precedent is not inconsistent with the written provisions of the contract, the same may be proven by parol, *but not so where such condition precedent is inconsistent with the written conditions of the contract*. The rule is thus stated in 32 CJS, page 859:

“Where the alleged condition precedent is inconsistent with the written instrument parol evidence thereof is inadmissible.”

And in Restatement of Law of Contracts, Section 241:

“Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative *if there is nothing in the writing inconsistent therewith.*” (*Italics added*).

And in Hanrahan-Wilcox Corporation v. Jenison Machinery Co., (Calif.) 73 P. (2) 1241:

“Lastly, plaintiff claims that the testimony does not come within the prohibition of the parol evidence rule because it does not change the terms of the written agreement but proves a condition precedent to its effectiveness. Testimony of the

circumstances surrounding the execution and delivery of a written agreement ordinarily do not vary its terms and is therefore not within the parol evidence rule. *Verzan v. McGregor*, 23 Cal. 330; *P. A. Smith Co. v. Muller*, 201 Cal. 219, 256 P. 411; *Gleeson v. Dunn*, 113 Cal. App. 347, 298 P. 119; *Cooper v. Cooper*, 3 Cal. App. 2d 154, 39 P. 2d 820. *However, if such testimony conflicts with the terms of the written agreement it falls under the ban of the rule. (Italics added).*

Here the condition precedent which appellant offered to prove was that he did not have the steers covered by the contract at the time the contract was signed, whereas the contract itself recited that he did have them. Thus, the condition precedent which he offered to prove is squarely within the limitations announced by the above authorities, and Judge Healy properly refused to receive the offer.

(d) *Contract provision result of appellant's mistake:*

Appellant further contends that the recital in the contract that he then owned the O left hip steers was a mistake and erroneous (See page 28 of Appellant's brief), and that he should have been permitted to show by parol what the true fact was. This is the identical situation that was involved in the case of *Milner vs. Earl Fruit Co.*, 232 Pac. 581, wherein the Supreme Court of Idaho held as follows:

The fact that the contract was signed and delivered at about dark, coupled with the further

fact, if it be true, that respondent did not read or understand the written contract, is not sufficient to set it aside and constituted nothing more than gross negligence upon the part of the appellant in failing to read the contract or have the same read to him, or to otherwise inform himself as to the nature, terms, and conditions thereof. *Constantine v. McDonald*, 25 Idaho 342, 137 P. 531; *Price v. Shay*, 110 Kan. 351, 203 P. 1105; 6 R. C. L. p. 624, § 43; 13 C. J. p. 370, § 249.

‘The general rule of law that parol evidence cannot be admitted to alter, contradict, vary, add to, or detract from the terms of a written instrument or contract has so frequently been laid down in text-books, encyclopedias, and decided cases that no useful purpose would be served by incorporating at length the discussions contained therein.’ ”

Also, *Elliott on Contracts*, Vol. 1, Page 192, as follows:

“Nor will one be relieved from the terms of a contract on the ground of mistake due to his negligence when it was within his power to have a stipulation inserted in the agreement which would have fully protected him. He is bound to assume any risk he might have provided against in the contract.”

Further than that, appellant's letter of November 3, 1946 (Exhibit 2, Record 27), proved that the recital in the contract that he owned the O left hip steers was no mistake, for in this letter he specifically described

them as "the best bunch of steers he ever fed." In the light of this letter it is difficult to conceive his contention that he didn't have the steers covered by the contract, and his recital in the contract that he did was a mistake. Why, if he didn't have them, did he make the representations to appellee he did as embodied in Exhibit 2?

(e) *Error, if any, not reversible:*

Even though it be conceded, which we do not, that the lower court should have received appellant's proffered testimony that he did not have the steers at the time the contract was signed, still it would not constitute reversible error, because the excluded testimony would have but created a conflict in the evidence, conflicting as it did with his letter, Exhibit 2, and the other evidence, and it is apparent from the trial court's memorandum decision how such testimony, even though received, would have been considered in the light of the other evidence contradicting it. Judge Healy made this very plain in his memorandum decision, wherein he stated (Record, page 166):

"In this and all other phases, I place no credence whatever in his (appellant's) testimony. Only in parts in which it is fully corroborated by other evidence do I regard it as worthy of belief."

It is apparent therefrom that the excluded testimony would not and could not have changed the trial court's belief as to the truth of the matter, and it is not re-

versible error to exclude evidence, even though properly admissible, where the effect thereof would not tend to change the final outcome.

The rule is thus stated in the case of *Thatenhorst v. United States*, 10 Cir., 119 F. 2d 567:

“From the whole facts, we are of the opinion that the judgment of the trial court is not clearly erroneous, because it is supported by substantial testimony admitted in the record, and that the ruling of the trial court on the admission or the exclusion of testimony offered and admitted could not affect the final result which the court reached as a trier of the facts.”

(f) *Waiver of conditions precedent:*

We have hereinabove demonstrated conclusively that the findings of the court to the effect that the contract was unconditionally delivered were in accord with the evidence, and that the court properly excluded appellant's offer to testify that he did not, at the time the contract was signed, have the steers referred to therein. We submit, however, that this question really becomes moot inasmuch as the court specifically found that even though a condition or conditions initially attached to the delivery of the contract, those conditions were subsequently waived by appellant.

This finding of waiver is amply supported by the evidence, as follows:

1. By appellant's acceptance and retention of the \$3000.00.

2. By appellant's letter of August 22, 1947, after demand for delivery had been made in accordance with the contract, wherein he gave his reasons for non-delivery as being that he couldn't fulfill, not that there was no obligation to fulfill (Exhibit 11, Record, 121-122).

3. By appellant's letter of August 28, 1947 (Exhibit 12, Record, 123) in which he made an offer in *settlement of the contract*; never denying, until this action was brought, that the contract ever became effective.

A succinct statement of the law regarding waiver of conditions precedent to the taking effect of the contract is to be found in 17 C.J.S. 933:

“Conditions precedent. As stated in Corpus Juris, which has been quoted and cited with approval by the courts, a party to a contract, who is entitled to demand performance of a condition precedent may waive the same, either expressly or by acts evidencing such intention; *and performance of a condition precedent to taking effect of the contract may be waived by the acts of the parties in treating the agreement as in effect.*”
(*Italics supplied*).

Thus we say that regardless of any question of conditional delivery at the time the contract was entered into, the evidence conclusively established the appellant himself, by his subsequent conduct, waived any and all conditions he now claims were precedent to the contract's effectiveness, and the trial court's finding that any such conditions were waived, must be sustained.

Being satisfied by the evidence that any claimed condition precedent had subsequently been waived by appellant himself, the ruling of the court upon evidence relevant to such condition would not be reversible error, because the evidence is immaterial. The rule is thus stated in 5 C.J.S. page 1053:

“Exclusion of evidence, although erroneous, is rendered immaterial by a finding on an issue which renders the exclusion of such evidence immaterial.”

In *Miller v. Estep* (Tex.) 5 S. W. (2nd) 876, the court in considering an error predicated upon the exclusion of evidence held:

“The conclusion necessarily follows that, even if the trial court erred in the particulars cited by plaintiff, such errors did not cause a different judgment to be rendered to that which would have been rendered but for such alleged errors, and they therefore affirmatively appear to be harmless.”

Thus it is in the instant case. The trial court having found that even though a condition initially attached to the delivery of the contract, such condition was waived by appellant, no prejudicial error could be predicated upon the exclusion of evidence relating to such condition, because, whether it did or did not initially attach, it would not operate to change the ultimate result.

II

If Appellant was required to deliver 240 steers, what would have been their weight and grade?

This is appellant's second point of argument, and we will answer the question embodied in the heading from the evidence itself. The court's finding is that the steers covered by the contract were "good quality steers" (Finding V, Record 174), and that the average weight thereof at the time delivery should have been made was 950 pounds each (Finding IX, Record 175). These findings were amply supported by the evidence.

Before reviewing the evidence itself, a review of the background may be helpful. Appellant contracted to deliver 300 steers branded O on left hip, and didn't deliver them. Appellant, by his own direct wrong in failing to deliver, made it impossible for appellant to prove the weight and quality at delivery time with the degree of certainty it would have liked. Now appellant says, in effect, "By my wrong I have made proof of exact weight and quality impossible; hence I cannot be held to answer for my wrong." Such, of course, is not the law, and appellee was and should be required to prove these facts only with such degree of certainty as the circumstances permit. Appellee, fortunately, was able to exceed appellant's expectations.

In appellee's pre-trial deposition (Exhibit 10) he testified that he did not use the O left hip brand at all in 1946. His testimony in this connection appears at page 26 of such deposition (Record, Page 108) as follows:

- Q. Did you ever use that O Left Hip brand on any of your cattle?
- A. Yes.
- Q. And was that brand on any of those cattle that you had in the fall of Nineteen Forty-six?
- A. No, sir.
- Q. When had you used that brand before?
- A. Oh, several different times.
- Q. In Nineteen Forty-five?
- A. Several years I have used it.
- Q. Well, in Nineteen Forty-five?
- A. I couldn't say for sure.
- Q. In Nineteen Forty-four?
- A. I might have.
- Q. Well, do you have any recollection as to when you did use it before?
- A. No.
- Q. Except that you know that you have used it?
- A. That's right.
- Q. But you didn't use it in Nineteen Forty-six?
- A. No, sir.

That this testimony was false was established by his employee, Orland Robertson, through whom it was established that from late October, 1946, until the forepart of December, 1946, (which was as late as Robertson could go, as he then left appellant's employ) appellant had steers which appellant himself had but recently marked with the O left hip brand. (Record, 46-49).

Appellant, himself, further proved the falsity of the testimony so given in his deposition. In his direct examination (Record 147) he told how he himself paint branded O on the left hip the steers Robertson took care of.

Thus it was, that while appellant denied in his deposition that he had any O left hip steers in 1946, appellant was able to prove that at the very time he signed the contract he had under feed steers so branded.

In the contract itself appellant represented that he owned the steers that were the subject of the contract; he himself inserting therein the description of the brand they bore, namely, O on left hip.

Further, in his letter of November 3, 1946, (Exhibit 2) he assured appellee that they were "the best bunch he ever fed"; that he had "sorted all the rough ones and large off steers out"; that he had "two bunches to receive * * * but will get them soon"; and that he would be "with the cattle" until the following Wednesday.

And so, despite appellee's covering, appellant was able to prove conclusively that at the time the contract was signed the steers that were the subject thereof were in existence, bore the O left hip brand, at least 218 head thereof then in appellant's possession, and the balance, if not then in his possession, soon to be received.

Thus, the existence of the O left hip steers which were the subject of the contract was conclusively and definitely established. However, it still remained for appellee to prove the quality of such steers, and their weight at the time they should have been delivered the following September.

As to this the trial court found they were of good quality, and would have weighed an average of 950

pounds at time of delivery. Appellant's contention is that there is insufficient evidence to support these findings, and no relevant facts were proven from which proper inferences of quality and weight might be drawn. That there was ample evidence to support these findings we will now show.

(a) *As to quality:*

(1) Appellant, according to his own testimony, had been engaged in the general ranching business for over thirty years, operating a thousand acre ranch near Irwin, Idaho (Record, 140). His operation consisted of buying, selling and feeding cattle for commercial purposes, and from time to time he had so handled cattle of all types (Record, 25). Under date of November 3, 1946, in returning the contract to appellee with directions to appellee to sign it, he described the steers that were the subject of the contract as being "the best bunch of steers I ever fed," with "all the rough ones and large off steers" sorted out (Exhibit 2, Record 27). When appellant himself, with the ranching record he had, described the steers as the best bunch he ever fed, with all the rough ones and large off steers sorted out, what possible inference can be drawn other than that they were top quality?

(2) Further in his pre-trial deposition (Exhibit 10, Record 110), in response to certain questions, appellant answered as follows:

Q. What kind of cattle were you selling under the terms of this contract to the packing company?

A. The original deal, as we drew it up, would have been good cattle, had we completed the deal.

Q. Now, then, what do you mean by "good cattle," are you speaking of grade now?

A. No, I mean quality.

Q. A good quality of cattle?

A. That's right.

(3) Further, appellant's employee, Orland Robertson, who was caring for the O left hip steers at the time the contract was signed, and at the time appellant was representing them to appellee as "the best bunch of steers I ever fed" described these O left hip steers as being "good quality." (Record, 49).

(4) And finally, appellant, in his letter of November 12, 1946, (Exhibit 14, Record 113) spoke of the steers, which were the subject of the contract, as yielding 59%. E. W. Fallentine, Appellee's general manager, who processes thirty-four to thirty-six thousand head of cattle annually through appellee's plant, proved that the average dressed weight yield of good quality steers was 56 to 61 percent of the live weight (Record, 116), thus definitely placing the contract steers within the "good quality" class.

It is significant that appellant, in arguing in his brief that there was no evidence to support the trial court's finding that the steers which were the subject of this contract were of good quality, makes no mention whatever of any of this evidence. Nevertheless, it is all

in the record, and we submit it not only supports the finding, but removes any doubt whatever of the good quality of the steers.

(b) *As to weight at the time delivery should have been made.*

Certainly the contract is silent as to delivered weights the following fall, because this fact was of necessity unknown at the time the contract was made. Appellee is likewise mindful of its inability to prove this weight with exactitude, because it never received the steers. However, as in the case of quality, it was able to establish with reasonable certainty what that weight would have been had the steers been received.

(1) Appellant himself established the minimum weight, for in his deposition he stated the steers at the time of delivery to appellee would have weighed "about nine hundred pounds." (Exhibit 10, Record 113). That he underestimated this weight was proven by other evidence.

(2) The witness Robertson testified that the O left hip steers appellant had at the time this contract was signed would, under normal feeding conditions, have weighed 925 to 1,000 pounds by August and September, 1947 (Record, 51).

(3) The steers that Robertson, as appellant's employee, was caring for at the time the contract was signed, and which appellant had branded O on the left

hip, also bore original permanent brand markings of former owners from whom appellant had obtained the steers, namely, Mrs. Grismer, Bruce Porter, Wayne Ricks, and ranches in the Pinedale Country (Record, 48). The O left hip brand appellant placed on the steers was not a permanent brand, but one which would lose itself over a period of months (Record 52, 147). However, in August and September, 1947, which were the months during which delivery should have been made to appellee under the contract, appellant sold on the Idaho Falls market steers bearing permanent brand markings of steers formerly owned by Mrs. Grismer, Bruce Porter, Wayne Ricks, and other ranchers from the Pinedale country. It does not appear that appellant, from the fall of 1946 through the summer of 1947, owned any steers formerly belonging to those several ranchers other than the ones Robertson was caring for and upon which appellant had placed the O left hip brand. Thus it becomes apparent that the steers appellant marketed at Idaho Falls in August and September, 1947, were the O left hip steers he owned at the time he made the contract and were the same steers covered thereby. The detail of the marketing of these steers is shown by Exhibits 3, 5 and 6 (Record 41 and 67, 68) and reflect the average weight of the steers as being 1046 pounds.

The evidence as a whole, accordingly, well supports the finding of the trial court of an average weight of 950 pounds, and appellant's contention that the finding is without support in the evidence is not well taken.

One further comment in connection with the identity of the steers which were the subject of the contract

may not be amiss. The evidence shows they were O left hip steers, and also shows that at the time the contract was signed appellant owned O left hip steers having himself but shortly prior thereto so branded them. The evidence further shows that the steers which were the subject of the contract were specifically described by appellant as the "best bunch of steers" he ever fed.

Appellant suggests, however, that in so referring to the subject of the contract he might have been referring to the Peterson steers at Jackson, Montana. How this could be, when the Peterson steers were neither branded O on left hip, nor being fed by appellant, he does not suggest. Also he doesn't point out that the O left hip steers he then was feeding were at Jackson, Wyoming, but a few miles across the line from his ranch, and this is the Jackson he obviously was referring to.

The difference between this case and the case of *Mason v. Ruffin* (La.) 130 So. 843, wherein the court found evidence insufficient to support a finding as to the weight of undelivered cattle is that in the *Ruffin* case no particular steers were identified as the subject of the contract, whereas in the instant case the subject of the contract was proven to be the O left hip steers appellant had when the contract was signed. It wasn't a case of proving the weight of unidentified steers, but of proving the weight of definitely identified steers, which appellee was able to do, and did.

III

Did the trial court err in holding that the parties merely modified the original contract, and what was the effect of any change or modification?

The trial court found in effect that subsequent to the execution of the contract it was modified to the extent of decreasing the number of steers covered thereby from 300 head to 240 head, and, except as so modified, was at all times in full force and effect (Findings IV, XIV, XVII and XVIII, Record 174, 175).

Appellant's argument under this heading is a little difficult for us to rationalize, but apparently he contends, first, there was no evidence to support a finding of modification, and the trial court should have found complete abandonment, and, second, having found modification, appellant ipso facto could not recover because it had sued upon the original contract, rather than upon the original contract as modified in accordance with the trial court's findings.

(a) *Appellant's contention that the trial court erred in failing to find from the evidence that the contract was abandoned.*

At the outset it should be noted that the issue of abandonment entered this case by virtue of Paragraph IV of appellant's amended answer, reading as follows (Record, 10):

“Further answering said complaint and by way of further defense thereto:

“Defendant denies that plaintiff has performed the conditions, stipulations and agreements of said alleged contract on plaintiff’s part to be performed, and in particular, defendant alleges that the plaintiff failed and refused to pay the \$3,000.00 mentioned and described in said alleged contract as having been paid at the time of the execution thereof, and, by reason of such failure on the part of plaintiff to pay such sum or any part thereof, there was a failure of consideration for said alleged contract and the same was rescinded and abandoned by the parties, and became, was, and is null and void.”

By Paragraph V of the amended answer appellant pleaded a subsequent new parol agreement, but did not plead thereby abandonment of the original contract. Thus the only issue, insofar as abandonment is concerned, is that raised by Paragraph IV. What is that issue? It is simply that by reason of appellee’s failure to pay the \$3,000.00 there was a failure of consideration and the contract was rescinded and abandoned.

Thus it is apparent, that the issue, while embodying the word “abandoned,” was really one of rescission for failure of consideration. Legal principles involved in the matter of rescission differ greatly from those involved in abandonment, the former requiring notice of rescission and restoration of statu quo, not necessary in the case of abandonment. Rescission is a method whereby one party to a contract may, under certain circum-

stances, relieve himself of his obligation; abandonment must be mutual.

But regardless of what it may be called, the issue was that appellant was entitled to be relieved from responding in damages for his failure to deliver under the contract, because appellant had not paid him the \$3,000.00 down payment, and both parties mutually agreed that the contract should be held for naught. The matter of the payment of the \$3,000.00 will be more fully discussed in our answer to Point VI of appellant's argument, wherein the question is directly involved, and for present purposes we pursue it from the standpoint that on the question of rescission or abandonment it is immaterial.

The agreement of the parties obviously was that an initial payment in the amount of \$3,000.00 would be made by appellee to appellant on the purchase price of the steers, with the balance to be paid after delivery. The contract was prepared in Ogden, where appellee had its principal office. Appellant was in Idaho. Had an agent of appellee's personally taken the contract to appellant in Idaho, the \$3,000.00 might have been paid, as the agreement contemplated, to appellant at the time he signed the contract. However, instead of such personal delivery, the contract was mailed to him on October 31, 1946, with the advice (Exhibit 13) that the

check would be mailed upon his execution and return of the contract. There is nothing unusual in that.

True, upon receipt of the contract without the \$3,000.00 appellant might properly have refused to sign it. This, however, he did not do, but on the contrary he signed the contract and returned it *with the request that the check be mailed to him* (Exhibit 2, Record 27). Thus, whatever right he had to insist on payment at the time of signing was waived by him. He was, we concede, thereafter entitled to receive it within a reasonable time, unless he likewise waived that right, or to rescind, and failure to rescind within a reasonable time after the right accrues constitutes a waiver of such right.

On November 12, 1946, appellant wrote appellee (Exhibit 14, Record 133), but nothing about the \$3,000.00 was said, nor any objection with respect thereto raised. Nor was any question about the \$3,000.00 raised until March 22, 1948, when appellant first raised it at the time of the first trial in this cause. In the meantime, and on or about November 29, 1946, appellant received \$3,000.00 from appellee, which he retained until September 11, 1947, or a period of nine months.

We submit, accordingly, that if defendant didn't get the \$3,000.00 as an initial payment on the contract, he waived any remedy he had with respect thereto (other, of course, than to receive it at the time the balance of the purchase price was paid) by failing to rescind. If he did get the \$3,000.00 on or about November 29, 1946, and that he then did receive \$3,000.00 from ap-

pellee is without dispute, by accepting and retaining it, he waived any complaint he might have had for appellee's failure to give it to him earlier.

So much for rescission. Now what about mutual abandonment, assuming it was properly raised as an issue.

Appellant's contention here is, that as he testified that the parties, shortly subsequent to the execution of the contract, mutually abandoned the written agreement, and as this testimony was uncontradicted, the court was bound to find abandonment, and it was error to find otherwise.

We concede the rule to be as pointed out by the Idaho Supreme Court in the case of *Pierstorff v. Grays Auto Shop*, 58 Idaho 438, 74 P. (2d) 171, cited by appellant, that the uncontradicted testimony of a "credible witness" should be accepted. Such rule has no application to appellant's testimony, however, first, because the court found, and made no bones about it, that appellant was not a credible witness, and, second, because this testimony was not uncontradicted.

As to appellant's credibility as a witness, Judge Healy thus found:

"In this and all other phases I place no credence whatever in his testimony." (Record 166.)

We cannot, of course, detail all of the circumstances that entered into Judge Healy's determination that ap-

pellant was unworthy of belief, but he certainly felt justified in his conclusion. Undoubtedly the following factors were impressive:

First, his denial in his pretrial deposition that he used the O left hip brand at all in 1946, (Exhibit, 10, Record 108) when the evidence conclusively established that at the very time the contract was signed he had O left hip steers, and had himself so branded them.

Second, his pleaded defense that he was unable to get the steers covered by the contract, in the light of appellee's proof that he actually had at least most of them, was receiving others, and his admitted reason in his deposition for not getting others was because he was "stalling." (Record 114). Also his statement to the brand inspector, Smith, that the steers contracted to appellee were on his ranch (Record 45).

Third, his contradictory denials and assertions in his amended answer as compared with his original answer as amended.

Fourth, his protestations of offers to perform in August, 1947, in the light of his letters of August 22nd and August 28, 1947, (Exhibit 11, Record 121, Exhibit 12) establishing that what he was attempting to do was to force appellee to pay more than the contract price.

Other circumstances undoubtedly influenced Judge Healy in discounting as he did the credibility of appellant, and the cold record, without regard to appellant's

demeanor and appearance on the witness stand, amply supports his conclusion.

As to appellant's contention that his testimony of abandonment was uncontradicted.

Here the record itself again provides the complete answer.

First, appellant accepted and retained, until after the delivery dates, appellee's check given as the down payment under the contract. True, he now contends the \$3,000.00 was paid under some other contract for some other steers, but when the money was attempted to be returned the following September it was accompanied by a letter acknowledging it was paid under *this contract*. More about this later.

Second, on August 22, 1947, (delivery time under the contract) appellant wrote appellee submitting a proposition "to try to fill the contract" (Exhibit 11, Record 121). What better proof that appellant then considered the contract an outstanding obligation, not an abandoned nullity?

Third, on August 28, 1947, appellant again wrote appellee saying "I therefore offer these to you in settlement of contract" (Exhibit 12). Again recognizing the then existence of the contract.

Fourth, appellee's repeated demands upon appellant for delivery of the steers, thus negating any possible inference that appellee considered the contract as having been abandoned (Exhibit 7, Record 84, 130, 138, 139).

We submit, accordingly, that appellee's testimony of mutual abandonment not only is not contradicted, but on the contrary the evidence, including appellant's own admissions in his letters of August 22 and August 28, conclusively establishes the parties themselves never considered the contract abandoned.

(b) *The trial court having found that the contract was modified to the extent of reducing the number of steers appellant was obligated to deliver, what is its effect on appellee's right of recovery.*

Appellant's argument here is that inasmuch as he, as a matter of defense, was successful in establishing that the written contract was subsequently modified to reduce the number of steers appellant was obligated to deliver from 300 to 240, and appellee had sued to recover damages on the basis of 300, appellee was entitled to recover nothing whatever, despite the fact that appellant didn't deliver the 240 head, or any part thereof; and particularly no recovery can be had, because of appellee's failure to amend its complaint to conform to the proof.

He then cites a number of authorities to the effect that where an action is based on one contract, and proof is made of another or modified contract, no recovery may be allowed. What he neglects to point out is that here the finding of modification is based on *appellant's evidence*, not appellee's, and under such circumstances the rule has no application.

The correct statement of the rule applied in the cases cited by appellant is as set out in 17 C.J.S. Page 1215, under the title "Contracts" as follows:

"If plaintiff declares on a contract as originally made, and *his* evidence reveals that the original contract has been superseded or materially modified by a subsequent agreement, the variance will be fatal to recovery."

In other words, if the plaintiff's evidence does not conform to his pleadings, he may not recover, absent an amendment of his pleadings to conform to the proof. That this archaic rule no longer applies in federal procedure we shall presently show, but, regardless of that, it has no application here, because it wasn't appellee's evidence that was at variance with his pleadings, but appellant's evidence that was at variance with appellee's pleadings, as is natural to assume it would be.

The trial court's findings of modification of the written contract to the extent of reducing the number of steers covered thereby from 300 to 240 head is based solely upon the \$3,000.00 draft given by appellee to appellant, and upon which was the notation "240 or more" steers. (Trial Court's Memorandum Opinion, Record 167). This \$3,000.00 draft was received in evidence as Exhibit 16, and as a part of appellant's defense, appellant himself testifying in his own behalf at the time. His counsel, Mr. Albaugh, offered the exhibit in evidence (Record 149).

Hence, it was appellant himself who proved the modification, not appellee; yet apptllant suggests ap-

pellee must amend its complaint to conform to appellant's proof!

Another reason, however, why this point of appellant's argument is not well taken is that the so-called variance rule is no longer regarded under federal procedure, and even though appellee had given the evidence supporting the finding of modification, it would not affect the judgment rendered on the contract as modified. Bearing in mind that no issue of modification of the original contract was raised by the pleadings (the issue being that the original contract was rescinded or abandoned) Rule 15(b) of the Federal Rules of Civil Procedure become pertinent:

“(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*” (*Italics added*).

Hansen v. Creedon, 8 Cir., 163 F. (2) 223; Globe Liquor Co. v. San Roman, 7 Cir., 160 F. (2) 800; Aetna Casualty & Surety Co. v. Rhine, 5 Cir., 152 F. (2) 368.

IV

Did the trial court err in refusing to permit appellant to impeach the witness Salerno?

Under this point of argument appellant persists, as in other parts of his brief, in indulging the assumption that the steers, which were the subject of the contract, were never identified, and that it should have called Mr. Salerno to establish this identity. This assumption of failure by appellee to identify the steers that were covered by the contract is not well taken, because appellant himself, *the owner and seller of the steers, identified them.*

In the preliminary negotiations appellant agreed to acquire steers for resale to appellee under the contract. How those steers would be identified appellee did not know, so when the contract was forwarded to appellant the identification of the steers was left for appellant to insert in the blank space provided therefor. This appellant did by inserting in the contract before he signed it the identification of the steers covered thereby, namely, steers branded O on the left hip. At that time he had steers branded O on the left hip, having himself so branded them, and he returned the contract to appellee, completed as to brand description of the steers, directing appellee to sign it (Exhibits 1 and 2, Record 21, 27, 28). Thus, as the trial court found, appellant's O left hip steers, by appellant's own acts, became appropriated to the contract.

These O left hip steers were still further identified as then being herded by appellant's employee Robertson (Record 47); as being long yearlings (Record 49); as being White and Brockle faced (Record 59); as then

weighing from 625 to 750 pounds each (Record 48). Finally, appellant himself told Robertson that these particular White and Brockle faced, long yearling steers, were under contract to be delivered the following fall (Record 47, 55).

Accordingly, we submit the steers covered by this contract were amply and positively identified, and there was no occasion for appellee to call Salerno, or any further witnesses, for this purpose, nor, as appellee viewed it, for any other purpose. He was, however, in court throughout the trial, available by either side as a witness, and appellant elected to call him to testify as his witness (Record, 126). Appellant categorically asserts he was a hostile witness (Appellant's brief, Page 75), though there was no outward evidence of hostility. The trial court, apparently because he was in the employ of appellee, agreed that appellant might ask leading questions (Record, 126). After some preliminary questions appellant asked (Record, 129):

Q. When was he to bring them to the ranch?

A. There was no specific time when he was to bring them to the ranch.

Appellant then sought to impeach the witness by proving that in his pretrial deposition the witness had stated that appellant *told him* he would "bring them to the ranch in the spring." Upon objection, the trial court stated that he would not permit appellant to impeach the witness unless he brought "the witness within the rule" (Record, 129).

Now, what is the rule? Obviously, the rule relating to impeachment of witnesses! Certainly it is not the rule cited by appellant relating to the use of depositions, because that was not involved. The question was not whether the deposition could be used for impeachment purposes, but whether the witness might be impeached. When, and under what circumstances this witness may be impeached is a matter not subject to express federal rule as such, as the witness was neither an officer, director, or managing agent of appellee, but a matter nevertheless governed by established legal principles.

Rule 43 (b), Federal Rules of Civil Procedure, provides:

“(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.”

The court permitted leading questions, but not impeachment at that stage, holding the witness must first be brought within the rule governing impeachment. As the witness clearly was not within Rule 43 (b), being neither an officer, director, or managing agent of appellee,

the right to impeach was governed by principles governing impeachment of one's own witnesses generally. Briefly, those principles involve hostility, surprise, and materiality and prejudicial character of testimony. Passing hostility and surprise, let's consider Salerno's testimony from the standpoint of its materiality and prejudicial character.

Salerno had testified that at the time of the preliminary negotiations he knew appellant did not have the steers he proposed to resell to appellee, but he was going to get them, and he assumed that by the time the contract was signed he had acquired them (as he actually had as shown by the other evidence). He was then asked (Record 129):

Q. When was he to bring them to the ranch?

A. There was no specific time when he was to bring them to the ranch.

It was on this answer that appellant sought to impeach him, by showing that in response to a question asked in his pretrial deposition he answered as follows (Record 129):

Q. I believe you just stated it was your understanding that he was to winter them in Wyoming and bring them to his ranch in the spring?

A. That is what Mr. Ruud told me; yes sir.

We submit that it was wholly immaterial whether, in the preliminary negotiations, "no specific time" was

agreed upon when the steers then being considered would be brought to appellant's ranch, or whether appellant told the witness he would bring them in the spring. In other words, it was an attempt to impeach on a wholly immaterial matter.

Neither was it, nor is it, apparent how the inconsistency could in any wise prejudice appellant's case. This was all involved in preliminary negotiations and discussions, with a subsequent written agreement entered into. The attempted impeachment, accordingly, was on neither a material or prejudicial matter, and no error occurred in the refusal to permit impeachment thereon.

There is, however, another and equally fundamental reason why impeachment of the witness in the manner sought was improper. Bearing in mind that the witness, albeit hostile, was appellant's witness, the rule is that impeachment under such circumstances is permissible only for the purpose of negating or neutralizing his adverse testimony, not for the purpose of getting prior inconsistent statements before the court as affirmative substantive evidence. Here the purpose of the attempted impeachment was, as appellant himself states in his brief, page 75,

“to impeach him through his pretrial deposition and compel him to divulge the facts.”
In other words, the purpose was to *discredit him, and then get the facts from him as a discredited witness.*

It is, therefore, obvious that what appellant wanted was unlimited right of cross examination of the witness,

not impeachment, and no error is predicated upon any limitation placed by the court upon the scope of appellant's examination of the witness.

That the trial court's ruling on the impeachment of the witness was not error becomes clear when it is viewed, as it must be, from the standpoint that the only legitimate purpose of impeachment is to negative or neutralize adverse testimony of the witness sought to be impeached, and all of Salerno's testimony might be eliminated from this record without affecting in any way the evidence supporting the judgment. His testimony was all as appellant's witness, and its complete and total neutralization would adversely affect only the defense.

In *Young v. United States*, 5 Cir., 97 F. 2d 200, the rule is stated:

"Neither, even where there is real surprise, is it proper to permit the impeachment to go beyond the only purpose for which it is admissable, the removal of the damage the surprise has caused."

V

Did respondent suffer any damage, and if so, are the same recoverable under the evidence in this case?

The contract here involved provided for a basic price of 29.66 cents a pound dressed weight for grade A steers. It further provided that for steers that graded higher appellee would pay a proportionately higher price, and for those that graded less a proportionately lower price. Quality was not mentioned in the contract

for the reason that the purchase price was fixed on a grade basis. However, good quality steers were appropriated by appellant to the contract as found by the court and supported by the evidence. The basic contract price of 29.66 cents dressed weight, when converted into live weight on a 59% yield factor, results in a live weight price of 17½ cents per pound, as pointed out by appellant at page 78 of his brief. Grade is determinable only after slaughter, quality is determinable before.

The evidence shows that the market price for good quality steers at the time delivery should have been made was 25 to 26 cents a pound live weight (Record 87). The court found the lesser price of 25 cents. The basic contract price was 17½ cents live weight (Record 29). Hence the measure of appellee's damages becomes the difference, or 7½ cents a pound.

But, says appellant, this is true only as to the steers that Grade "A," and we might have delivered you a lower grade on which the market was less than 25 cents, and hence your damages would have been less. The fallacy in this lies in not giving due regard to the contract formula, because, if lower grades were delivered, carrying with them a lower market value, appellee, under the contract, would pay for them, not on the basis of 17½ cents a pound, but at a proportionately lower price. Thus the spread between contract price and market value for low grade steers would be the same as for the higher grade. If appellant was to get 17½ cents regardless of grade his point might be well taken, but such was not the case. For lower grades he received less money, and the

establishment of the difference between contract price and market value as to one type of steer at 7½ cents automatically fixed the measure of damages per pound for all steers, regardless of type. This pricing formula is embodied in the contract, and no independent evidence thereof was necessary. Having the formula, and having the measure of damages, namely 7½ cents per pound, the only factor lacking for a determination of total damages is that of weight of the steers appellee should have received and didn't.

The question of weight has already been discussed, and the evidence amply supports the finding of 950 pounds per animal. As a matter of fact it supported a possible finding of much greater weight, so appellant shouldn't be heard to complain of the court's finding of the lesser. This evidence showed that appellant owned O left hip steers; it showed these steers were good quality; it showed their weight at the time the contract was made as being from 625 to 750 pounds each; appellant himself fixed a weight of 900 pounds at time of delivery; other evidence fixed an average weight of nearly 1,050 pounds. The finding of the court of an average weight of 950 pounds was well within the evidence, and we submit that appellant's contention that it is founded purely on guess work and speculation is not well taken.

Appellant's other point under this phase of his argument is that appellant offered to perform, and appellee refused. He testified that he *orally* told Salerno he would go on the market and buy steers to fill the contract and that this testimony was uncontradicted. He

also comments upon the asserted failure of Mr. Salerno to deny the testimony of this offer. Not only was this testimony contradicted, but the record shows that it was categorically denied by the other purported party to the conversation, Mr. Salerno. Near the conclusion of Mr. Salerno's cross-examination he was asked and answered as follows (Record 139):

Q. In any conversations you had with Mr. Ruud or any dealings with Mr. Ruud during August or September, 1947, was any offer made by Mr. Ruud to deliver cattle other than embodied in the letters sent?

A. He offered to deliver what cattle he had on the ranch for more money if we cancelled the contract.

Q. Was any offer made other than stated in your answer?

A. No sir.

In addition to the direct denial of the conversation, further doubt is cast on it by the circumstances under which it was purportedly held. Appellant says it was held the "last part of September" (Record 160). This was not only after he had refused delivery, but after he had retained counsel to defend him and to return the \$3,000.00 (Exhibit 8).

Now as to the so-called offers by mail. Two letters were written by him, dated respectively August 22, 1947, and August 28, 1947 (Exhibits 11 and 12). In the letter of August 22nd appellant said:

“I am willing to let you have the cattle we have at the ranch delivered to Ogden and weighed off trucks at 19 cents per pound.”

Certainly, this is no offer to fulfill the contract, but rather an offer to deliver some cattle if appellee would pay more than the contract.

In the letter of August 28 appellant said:

“I therefor offer these to you in settlement of the contract as set forth in letter of 22nd.”

Again this isn't an offer to fulfill or partially fulfill, but an offer to deliver if appellee would pay a higher price, and also give appellant a full and complete release of his obligations under the contract.

In the light of all this it is difficult to understand appellant's assertion that the evidence establishes that he offered to do everything the contract obligated him to do. Our view of the evidence, shared by the trial court, is that he never performed, or offered to perform, in a single particular.

VI

Did respondent fully perform the terms of the contract on its part to be performed?

The only contention here argued is that appellant failed to pay the \$3,000.00 down payment, and hence a complete failure of consideration. He here asserts that the only payment which was ever made by appellant was shown by the uncontradicted evidence not to have been paid on this contract.

The uncontradicted evidence he refers to is, of course, his own unsupported testimony. But even this testimony is contradicted by documentary evidence.

The issue is raised by Paragraph V of appellant's amended answer (Record 10), reading as follows:

“Further answering said complaint and as a further defense thereto:

“Defendant alleges that after it became apparent that said cattle could not be obtained which defendant and plaintiff contemplated that defendant would purchase at the time said alleged contract was signed, and on or about the *8th day of December, 1946*, the parties hereto entered into a new parol agreement under which plaintiff advanced to defendant the sum of \$3,000.00 to assist defendant in purchasing other cattle to be fed by defendant and sold and delivered to the plaintiff in the fall of the year 1947; that defendant was unable to purchase cattle which would comply with the terms of said parol agreement and on or about the 11th day of September, 1947, defendant offered to return said \$3,000.00 to plaintiff with interest at the rate of six percent per annum, amounting to the sum of \$3,135.00, and defendant at all times since has been, and now is able, ready and willing to repay said amount to the plaintiff but that plaintiff refused, and still refuses to accept the same.”

It will be recalled that in late November, 1946, appellant received appellee's check for \$3,000.00. The proceeds of this check he retained until September of the following year and subsequent to the time he was called upon for delivery under the contract. Then under date

of September 11, 1947, through his attorney, he attempted to repay the \$3,000.00 with interest, forwarding appellee a check accompanied by a letter. The letter does not appear to be set out in the Transcript of Record, but it was received in evidence as Exhibit 8, as follows:

“American Packing & Provision Co.,
Ogden,
Utah.
Gentlemen:

Last November you gave your check to Bert Ruud for \$3,000 as an initial payment under a purported contract of sale for 300 head of steers.

I have advised Mr. Ruud to return this money to you, together with interest at the legal rate of 6% from the time he cashed your check. He informs me that he cashed your check in December, 1946, and we have included interest for nine months. Enclosed you will find Mr. Ruud's check for \$3,135.00.

Very truly yours,

RALPH L. ALBAUGH /s/
Ralph L. Albaugh.”

This we say is conclusive proof that the \$3,000 was paid under this November contract, and not under any subsequent December contract as pleaded, and appellant by such letter so acknowledged it to have been paid under this contract.

More, however, appellee refused to accept the check tendered by appellant, returning it by letter on October 14, 1947, received in evidence as Exhibit 9, as follows:

“Mr. Ralph L. Albaugh
Attorney for Bert Ruud
Idaho Falls, Idaho

Dear Sir:

We are enclosing herewith check payable to American Provision and Packing Company in the amount of \$3,135.00, executed by Bert Ruud, which was received from you in your letter of September 11, 1947, addressed to the American Packing and Provision Company.

By the return of this check we do not intend to waive and do not waive any right to the amount represented thereby and contemplate an action to recover not only the amount evidenced by this check, and all other General Damages for breach of that certain contract entered into the 4th day of November, 1946, between Bert Ruud of Irwin, Idaho, and the American Packing and Provision Company of Ogden, Utah.

Yours very truly,

O. R. BAUM, Attorney
for American Packing
and Provision Company”

Thus not only was the \$3,000.00 attempted to be returned by appellant acknowledged by him to have been paid under the November contract, but likewise when it was returned by appellee to appellant it was recognized as being the \$3,000.00 paid under the contract in issue.

Yet appellant asserts in his brief that the evidence was uncontradicted that the \$3000.00 paid in November, 1946, was paid under a subsequent contract, which by his pleadings, was not even in existence at the time the

money admittedly was paid.

Be that as it may, however, the point is not crucial, for non-payment of the \$3,000.00 would at most but give him a right to rescind, which right he never exercised. On the other hand, as we have previously pointed out, he at all times considered the contract as effective. At the risk of some repetition we refer to his letter of August 22, 1947, (Exhibit 11):

“With reference to our different talks on this contract wish to submit the following *to try to fill the contract.*”

Also his letter of August 28, 1947, (Exhibit 12):

“I therefor offer these to you in settlement of contract * * * .”

Obviously, if he didn't get the initial down payment (the evidence to the contrary), his subsequent conduct in recognizing the contract as a subsisting agreement constitutes a waiver with respect thereto, and he cannot now be heard to say that the agreement was void ab initio.

VII

Did the trial court err in denying appellant's motion to dismiss at the close of respondent's case?

The factors here involved go to the sufficiency of appellee's evidence to make out a prime facie case of recovery. Briefly this evidence showed:

- a. The execution and delivery of the contract.
- b. That the delivery was unconditional and was at all times recognized by both parties as be-

ing in full force and effect, as evidenced by:

1. Appellee's demands for delivery.
2. Appellant's letters of August 22nd and 28th, 1947, in which denial of the existence of the contract was not asserted, but on the contrary appellant suggested means "to fill the contract," and "in settlement of the contract." (Exhibits 11 and 12, Record 121 and 123).
3. The presumption of legal delivery arising under Idaho law (*Ellwing v. Muellen*, *supra*) from use of the language "made and executed."

c. Appellees performance under the contract. In appellee's complaint, it is alleged that it had done and performed everything on its part to be performed. That this is proper pleading in the Federal courts is settled by Rule 9 (c) of the Federal Rules of Civil Procedure. Appellant's answer thereto (Paragraph IV of amended answer) is to deny appellee's performance generally, and affirmatively allege appellee failed to pay the \$3,000.00 mentioned in the contract, and therefore there was a failure of consideration.

The general denial of performance is insufficient to raise any issue. (Rule 9 (c) *supra*. *Coral Gables, Inc. v. Skehan*, 47 F. Supp. 1.) However, assuming the issues of performance were properly raised, adequate proof of performance was made.

Under the contract appellee's direct obligations were as follows:

1. To pay the purchase price for the steers after they were delivered and slaughtered.
2. Request delivery of the steers during the months of August or September, 1947.

No other direct obligation on the part of the appellee is to be found within the written contract. As to the first, delivery was never made, so duty to pay for them never arose. Demand for delivery was duly made. (Exhibit 7).

But appellant asserts there was a failure of consideration in that the \$3,000.00 was never paid. Proof of consideration was not a part of appellee's affirmative case. Here there was a written instrument, and under the Idaho law, *Section 28-103 I.C.A.*

“A written instrument is presumptive evidence of consideration.”

Also Section 28-104, I.C.A.

“The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.”

Also Rule 8 (c) of Federal Rules, declaring failure of consideration to be an affirmative defense.

Still further it was affirmatively shown, as noted above, that the parties themselves at all times regarded the contract as of full force and effect.

And, finally, it was affirmatively shown that appellant, as late as nine months after he received \$3,000.00 from appellee, acknowledged that the \$3,000.00 was re-

ceived under this contract; for in his attempted return of the money, long after he had failed to make delivery, he referred to the \$3,000.00 he had received as "an initial payment under a purported contract of sale for 300 head of steers." (Exhibit 8). Even appellant does not contend there was any other contract, purported or otherwise, for 300 steers.

d. Appellant's breach. Demand for delivery and non-delivery by appellant was conclusively established (Exhibit 7, Record 84; Record 116).

e. Resulting damages. The steers covered by the contract were identified by appellant himself by this insertion of the brand description in the contract, namely, O left hip steers. His O left hip steers were specifically identified as being White and Brockle faced (Record 59); as being long yearlings (Record 49); as being herded by appellant's employee, Robertson (Record 47); as then weighing 625 to 750 pounds each (Record 48); as being good quality (Record 59); as being "under contract" (Record 47, 55). The difference between contract price and market value at time of delivery, namely 7½ cents a pound, was shown (Record 29 and 87); their average weight at time of delivery was established (Record 51, Exhibits 3, 5, 6, Record 41, 67, 68). With damages per pound and weight at time of delivery thus established, appellee's damages then became but a matter of mathematical computation.

We submit, accordingly, that each and every element essential to appellee's right of recovery was well established by appellee's evidence, and the appellant's motion to dismiss was properly denied.

VIII

Appellant did not receive a fair trial.

This, without question, is the most serious charge embodied in appellant's brief, directed as it is toward the conduct of a trial presided over by a member of this court. Its seriousness necessitates more than mere passing comment, reflecting, as it does, upon the judicial integrity of Judge Healy.

An examination of appellant's argument under this point indicates that the charge of unfairness springs from two contentions (a) that the trial judge discounted the credibility of appellant as a witness, and (b) that the court adopted a wrong theory of the case.

As to the first we cannot, as we have hereinbefore observed, attempt to detail the factors that entered into the trial court's conclusion that appellant himself was not being fair and honest in his testimony. Obviously, his appearance and demeanor on the witness stand made its influence felt. His self contradictions undoubtedly were important. In his pretrial deposition he denied using the O left hip brand for several years, specifically denying that he used it in 1944, 1945 or 1946 (Record 108). Yet it was conclusively proven at the trial that at the very time he signed the contract he had O left hip cattle and had himself so branded them. He attempted to excuse his non-delivery upon the grounds that he didn't have the steers, and couldn't get them. Yet it was conclusively shown that he had O left hip steers,

and he was "stalling" in his effort to acquire others. He attempted to make the court believe that he offered to fill the contract, but the evidence showed all he did was to attempt to gouge a price of 19 cents for some undetermined number, whereas his contract was for 300 head at $17\frac{1}{2}$ cents. And also he solemnly testified under oath that when appellee demanded delivery, and he was unable to deliver, he stated to Salerno:

" 'I will go to Denver and buy you 300 steers and sell them to you for $17\frac{1}{2}$ cents,' and he (Salerno) said, 'What kind of steers,' and I said, 'Steers as called for in the contract and will sell them for $17\frac{1}{2}$ ' " (Record 158).

This conversation was, of course, denied by Salerno, (Record 140), but the point is, he was endeavoring to induce the court to believe that he offered to give appellee just what the contract called for at the contract price of $17\frac{1}{2}$ cents, and that appellee refused to receive it. Small wonder the trial court was skeptical of his truthfulness. Certainly, in the light of his self-contradictions it cannot be said that the trial court was unfair in declining to accept his uncorroborated testimony, and finding the facts contrary thereto and in accordance with corroborated documentary evidence.

As to his contention that the court adopted the wrong theory, the only theory the trial court adopted was that the evidence was sufficient to show a right of recovery in the appellee, and it accordingly so found and concluded.

He says the trial court should have permitted him to prove that when the contract was signed he didn't have the O left hip steers, and his recital in the contract that he did was a mistake (Record 141, 142). It would seem that in the light of the conclusive evidence that he did have the O left hip steers, the court was doing him a favor in protecting him from the opportunity of perjuring himself, but further than that, as the court ruled, mistake in the contract was not pleaded as a defense, and was not an issue. To prove that he didn't have the steers, when his agreement recited that he did, was to vary the writing, and properly inadmissible in the absence of a pleading raising the issue of mistake.

He says the trial court erred in not permitting him to state *why* he didn't buy steers for appellee "under any contract" in late November, 1946 (Record 155). This was three or four weeks after the contract was signed, and further the question did not relate to this contract, but to "any contract." The issues were whether there was a valid contract, and, if so, why he didn't deliver? The question on its face called for an immaterial answer.

Such, therefore, is the basis for the charge that appellant was not given a fair trial. We submit that it is entirely unfounded, both in fact and in law.

CONCLUSION

We submit the judgment of the trial court should be affirmed. Every fact found is well supported by the evidence. Most of the evidence supporting the findings is without contradiction.

Appellee affirmatively proved the execution and delivery of the contract; it identified the specific steers covered thereby; it established their quality as good quality; it proved with reasonable certainty what those steers would have weighed at time of delivery; and it proved the market value of steers of that type at the time delivery should have been made. Thus, the amount of the judgment became but a mathematical calculation, namely, difference between contract price of $17\frac{1}{2}$ cents a pound and market value, at the time fixed for delivery, of 25 cents a pound, or $7\frac{1}{2}$ cents, multiplied by the total weight at the time of delivery. Appellee's right of recovery in the amount of the judgment rendered by the trial court was thus established.

Appellant's evidence did not defeat the right so established. He contended the contract was delivered conditionally, and was not to take effect until (a) the shrinkage provision was eliminated, and (b) until he obtained the steers which were the subject of the contract. As to the shrinkage matter, his first letter (November 3, 1946) was that he "would like" the 3% shrinkage eliminated. His second letter (November 12, 1946) suggested that it be cut from 3% to $1\frac{1}{2}$ %. Thereafter he at all times, as evidenced by his subsequent letters (October 22nd and October 28th) treated the contract as in full force and effect.

As to the asserted condition that the contract was not to be in effect until he had the steers, the evidence conclusively showed that he had them at the time the contract was signed. Obviously, this then could not have been a condition to delivery.

He asserts the contract never became effective because he never received the \$3,000.00 initial payment. We have shown by the letter through which he attempted to return the \$3,000.00, some nine months after he received it (Exhibit 8), that he acknowledged the \$3,000.00 he so received was paid him under this contract. Further, his conduct in regarding the contract as valid and subsisting as late as when he was called upon to make delivery would constitute a waiver, insofar as the earlier payment of the \$3,000.00 was concerned, if originally it was not paid strictly on time.

His assertions of mutual abandonment and offers to perform require no further comment. On every matter of defense raised, there was at most but a conflict in the evidence, and very little of that, and each and every finding of the trial court is amply supported by the evidence.

The judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD

Appellant

vs.

AMERICAN PACKING & PROVISION CO.,
a Corporation,

Appellee

Appellant's Reply Brief

Appeal from the United States District Court for the
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APPELLANT'S REPLY BRIEF

Appellee appears to generally predicate its argument in its brief on the theory that it has positively and definitely identified the so-called Wyoming steers as the subject matter of the contract in suit, and upon the further proposition that appellant's testimony was all perjury and the trial court justified in refusing to give any credence thereto. Appellee has offered little or no explanation or argument on many important matters, issues and questions arising from the evidence, which were pointed out by appellant in his prior brief. It argues only from so much of the evidence as it feels supports its position, and ignores everything which does not. In other words, it argues that the case can be determined on only part of the facts, and that the part favorable to it.

Appellant feels that the case can only be correctly decided when all the facts are taken into consideration. It accordingly becomes necessary for appellant to point out what appellee is ignoring or overlooking in its argument, whereby the same is unsound in many respects.

Inasmuch as appellee's theory of its having identified the subject matter of the contract with complete certainty runs throughout its argument, we will discuss this, and also the other charge that

appellant's testimony is all perjury, before discussing appellee's arguments on the individual numbered issues as they are set up in the prior briefs.

We pointed out in our prior brief certain facts and circumstances which we felt showed quite fairly that the Wyoming steers were not, and were never intended or understood by either party to be, the subject matter of the contract. We particularly pointed out that appellant undoubtedly owned these particular steers before and during the time the contract was being negotiated, yet Salerno admitted he knew appellant did not have any steers for the contract, and that he would have to acquire them. Appellee says nothing about this particular admission of its own agent.

We also pointed out that the Wyoming steers were of a different size and type than the parties wanted for the contract. Appellee says nothing about this.

We also pointed out and emphasized that several weeks after the contract was signed, appellant told Salerno he had fallen down on getting the steers for the contract, which Salerno has never denied. We noted that appellant's testimony in this respect is corroborated by the fact that Salerno agreed to reduce the number of steers to be delivered from 300 to 240. Appellee omits to explain this, for obvious reasons.

We also showed that it was more than a month after the contract was signed before appellee put up any money. Appellee gives no explanation of

that fact, although we stated, and the record shows, that negotiations were still going on, and during that time Salerno did not regard the deal as consummated, and he knew that appellant had not yet acquired steers for the contract.

Appellee's claimed identification of the Wyoming steers is apparently largely centered around the insertion by appellant of the words "O left hip" in the blank left in the contract, coupled with the fact that the Wyoming steers had been marked with paint daubed on by the bottom of a bottle or a stick.

We showed that the recital that the steers were on the ranch, branded in a certain manner, was merely a statement which both parties understood was something which would be true only at some future time. Salerno admitted he knew the steers would not be placed on the ranch until the following spring. Appellee makes no mention of this admission, but it follows that if there were no steers on the ranch, they could not be branded in any manner.

So far as this recital of the steers being branded in a certain manner is concerned, there is nothing more sacred about it than the recital that the \$3,000 had been paid. Appellee says it is not unusual for parties to put such a recital of payment in a contract when in fact it is understood it will not be paid until a future time. We agree. Neither is it unusual for parties to insert other recitals which are understood to express the intention of the parties as to what will take place, although they are in form

statements of existing facts. This particular recital about the steers being on the ranch, branded in a certain manner, is on exactly the same legal basis as the recital that the down payment had been made, and, under well established rules of law, evidence to show the actual facts in either case should have been admitted. (22 C.J. 1233. *Kay v. Spencer*, 213, Pac. 511; *Crandall v. Willig*, 46 N.E. 755.)

We think the attempt to call this smear of paint a "brand," within the meaning of the word as used in the contract, is more than a little ridiculous. The manner in which the paint was applied is in the record—by dipping the bottom of a bottle in green paint and then applying it on the steer. The purpose of putting it there was also shown—to mark the steers for temporary identification while the steers were being moved. From the time the contract was signed until the time for delivery was nine or ten months. This mark would stay on the steers at the most for two or three months. It would be utterly useless to identify the steers at the time of delivery under the contract.

Certainly this much is established by the record—when Salerno called at appellant's ranch and made demand for delivery, none of these Wyoming steers showed any evidence of an "O" brand on the left hip, by paint or otherwise. They did wear brands, but none were "O" brands. Salerno himself said he could not claim any of the Wyoming steers because they did not bear the brand called for in the contract.

(Rec. p. 130-131). The brand inspector, J. J. Smith, testified he never saw an "O" brand on the left hip of any of these Wyoming steers at any time. (Rec. page 44)

The term brand has a well understood meaning among cattlemen. It is ordinarily a mark applied by using a hot iron, or acid. It is a permanent mark. Webster's International Dictionary says, "a mark burned into anything by its owner as a means of identification, as upon a cask or cattle." As a verb, "to burn or impress a mark upon, with a hot iron, as to **brand** a steer."

In *Johnson v. State*, 1 Tex. App. 333, the court had occasion to define the word, and held that under Pasch. Dig. art. 4659, providing that no brands, except such as are recorded, shall be recognized in law as any evidence of ownership, "brand" does not include marks, and the prohibition is not applicable to marks. In *Churchill v. Georgia R. & Banking Co.*, 33 S. E. 972, it was held that "brand" indicates some figure or device burned on the animal by a hot iron, a means of identification, commonly used on animals. These definitions are but what is commonly understood by the word in a livestock country. There are ways of branding steers other than by using a hot iron, but the word necessarily implies a permanent mark of some sort. In ordinary range practice, paint is never used for anything except a temporary means of identification while livestock is being mov-

ed along the stock trails, just as was done in this case.

The basis of appellee's charge that all of appellant's testimony was false and untrue is closely connected with, and arises out of, this claimed identification of the Wyoming steers as the subject matter of the contract, as appears from pages 16 and 17 of appellee's brief. Appellee says that at the time the contract was signed, appellant had steers branded O on left hip. This necessarily assumes that the paint mark can be called a brand, and we maintain this cannot reasonably be done. Appellee says that appellant referred to these steers as "the best steers he ever fed," obviously referring to his letter of November 3, Exhibit 2. This assumes that the letter referred to the Wyoming steers, but we say this is not the case. We think it is obvious that the letter referred to the Peterson steers at Jackson, Montana. Appellee carefully avoids mentioning that weeks after this letter had been written, and before any money was paid, Salerno was told by appellant that he had fallen down on getting steers for the contract. Appellee also fails to note that the reduction in number was made long after this letter was written for the obvious reason that appellant had so fallen down on getting the steers he had expected to get, and which he believed he was getting when he wrote the letter. We believe appellee should give fair consideration to these things and give some reasonable explanation of them before it can charge appel-

lant with perjury.

To charge any witness with perjury is a most serious charge and should rest on a most substantial basis. We will refer to the other matters upon which appellee claims it can make such an accusation in answering appellee's brief on the separate points in the order in which they appear and are numbered. We say here, however, that appellee simply ignores vital, established facts in making this charge of perjury. As a result, the charge is without merit.

I

Issue of Conditional Delivery

We will take up the points urged by appellee as justifying the trial court in precluding appellant from showing that he did not have the steers covered by the contract at the time of the signing thereof.

(1) Appellee says that because appellant signed the contract which recited that he had the steers, and inserted the brand description, he acknowledged having the steers, and it would tend to vary the terms of a written contract to allow him to show that such recitals were not true. We think we have correctly outlined the law relative to such cases in our prior brief. We think the record amply supports our statements that both parties fully knew and understood that the steers would not be put on the ranch for several months. It is unnecessary to repeat what we have said in our prior brief on the

law and the facts. We would add that we think it is a rule of general application that it is always competent to show the intention of the parties to a written contract by showing the surrounding facts and circumstances. The cases we cited show that conditional delivery can always be shown by parol, anything in the contract to the contrary notwithstanding, because such evidence goes to the existence of the contract, not to its terms. It is also well established law that mere recitals of matters of fact in a contract, not being of a contractual nature, may be contradicted. 22 C. J. 1233. As was said in *International Trust Co. v. Palisade Co.*, 153 Pac. 1002, "Not every statement in a deed or contract binds parties to it by way of estoppel. To render a statement effective as an estoppel it must appear that it was made of some matter which is thus settled as a fact. A recital as a rule does not raise an estoppel. To give it that effect, it must show that the object of the parties was to make the matter recited a fixed fact. *Hays v. Askew*, 50 N. C. 63. Recitals which are general and not contractual, merely descriptive, are not binding. *Muhlenberg v. Druckenmiller*, 103 Pa. 631. To be binding the recital must be of matter material to the purpose of the instrument. *Reed v. McCourt*, N. Y. 435. The rule does not extend to that which is mere description, or an averment which is not essential and the doctrine has always been construed with great strictness."

"A mere statement of fact, known by both parties

to be untrue, gains no sanctity by reason of being stated in writing, and may be disproved." *Kay v. Spencer*, 213 Pac. 731; *Crandall v. Willeg*, 46 N. E. 755; *Corbett v. Cronkhite*, 87 N. E. 874.

As we have pointed out in our previous brief, the manual delivery of the contract was presumptive only as to actual delivery, and the presumption is rebuttable. Salerno did not regard the contract as final when he wrote his letter of November 15, 1946, Exhibit 15, to appellant. The fact that a change was made in the number of steers to be delivered more than a month after the contract was signed strongly tends to rebut the presumption of unconditional delivery. Appellee does not discuss these items.

(2) Appellee's second point rests entirely on the letter written by appellant on November 3, 1946, Exhibit 2. We have discussed the facts and circumstances which show that this letter referred to the Peterson steers at Jackson, Montana, but we note that appellee avoids any discussion thereof, or of the facts (1) that Salerno was told that appellant had fallen down on getting these before any money was put up by appellee, and (2) the contract was either substituted or modified long after this letter was written.

(3) Appellee's third point seems to rest on the testimony of Orland Robertson that the paint mark made an "O" brand. If this was a brand, why did the brand inspector, J. J. Smith say there was no

O brand on any of the Wyoming steers? Why did not Salerno claim these particular steers when he made demand on appellant for delivery if they were O left hip steers?

(4) Appellee's last point concerns the testimony of said J. J. Smith. It is true that Smith did at first testify to the effect that appellant told him in August, 1947, that the steers under contract to appellee were on the ranch. However, it is necessary to consider all of Smith's testimony to see whether any such statement was actually made. We invite the court's attention to his cross-examination, pages 79-83 of the record. When we take all of his testimony together, we find that he himself admits his memory of the conversation was very vague, and the substance of the conversation appears quite differently. The general effect of the conversation seems to have been that Smith knew there was a controversy between appellant and appellee over a contract, and that appellee was claiming some right in the nine head of cattle which appellant or his son had obtained from Bruce Porter. Appellant undoubtedly assured Smith that these nine head had nothing to do with the contract. They then talked about whether or not appellee claimed any right in the other cattle appellant had on his ranch, and appellant very possibly did say that he had offered them to appellee, or would offer them, in settlement of the controversy. As we say, Smith was very vague, and

but little can be gathered from his testimony.

These seem to be all of the points which appellee urges as proving the Wyoming steers were the contract cattle. Appellant's position is that while these facts, standing alone, might tend to indicate that was the case, it is necessary to consider all the facts.

Appellee, on page 17 of its brief, argues that the parol evidence which appellant sought to introduce to show conditional delivery would tend to vary the recitals in the written contract. We have covered this phase of the situation in our prior brief. Appellee admits our statement of the law is correct, claiming only that where there is anything in the contract to the contrary, the parol evidence is inadmissible. An examination of the only case cited by appellee, *Hanrahan-Wilcox Corporation v. Jenison Machinery Co.*, 73 Pac. (2d) 1241, shows that it does not go to the point claimed. That case grew out of a contract for the rental of a road grader, the contract providing for a 6½ month term. After receiving the machine and using it for 90 days, the lessee became dissatisfied with its performance and returned it to the defendant. Defendant had demanded and plaintiff had refused payment of the rental. Thereupon plaintiff brought action to have the court declare the written contract never became effective on the ground that contemporaneously with its execution, the parties had orally agreed that the written contract was not to be effective unless and until plaintiff was satisfied, after trial, with the perfor-

mance of the machine. The alleged oral agreement would simply tend to delay the effective date of the written agreement, and it was held it would be inconsistent with the provisions in the agreement that rent began on the day of shipment of the machine to plaintiff. This case is not unusual, nor does it differ with the case cited by appellant. Actually, in principal, what was contended for did not constitute a condition precedent, but was something more in the nature of a condition subsequent. Evidence of a condition subsequent claimed to have been agreed on prior to or contemporaneous with the execution of a written contract is never admissible. Such a condition does not go to the existence of a contract as a valid, subsisting agreement. The distinction is pointed out in 20 Am. Jur. 957, where, in discussing evidence of conditional delivery, it is said:

“It is frequently very difficult to distinguish between evidence of the character now under consideration and evidence which falls within the condemnation of the so-called “parol evidence rule.” A test which is commonly applied is whether the evidence shows a condition precedent or a condition subsequent. In the former case, the evidence is admissible, in the latter case, not. The condition precedent must be a condition precedent to the instrument becoming a valid obligation, and not merely a condition precedent to the performance thereof if the

evidence is admissible.”

On page 19 of its brief, appellee says appellant contends that the recitals in the contract that he then owned the steers branded O left hip was a mistake. We do not so contend. We say, as we have always said, that this was a mere statement or recital of what the parties intended would be the fact at a future time, but that it was understood by both that it did not represent present facts.

Appellee, on page 21 of its brief, gets closer to the real point in issue. It says that if there was error in excluding this evidence, it would not be reversible, because it is apparent from the trial court's memorandum decision that the trial court would not have believed anything appellant testified to anyway.

The situation seems somewhat mindful of the justice of the peace who said he would not hear any evidence on the part of the defendant in any of the cases tried before him, because it only tended to confuse him.

Whether the trial court would believe any of appellant's testimony or not, if it was competent it was admissible, and appellant was entitled to have it in the record, not only for the trial court's consideration but for any appellate court to consider. We feel, as we have stated, that it really was because the trial court did not hear all the facts, and this evidence in particular, that it took the attitude it did toward appellant's testimony. We think if all the facts and circumstance had been properly

before the court, showing what the parties really intended by this contract, appellant's testimony would have been well substantiated by these facts, and the trial court would have felt much differently about the credibility of appellant's testimony. Moreover, as we have said, under Idaho law, a trial court may not arbitrarily or capriciously disregard the testimony of a witness, even though the witness be a party, unimpeached by any of the modes known to the law, if such testimony does not exceed probability.

Appellee's conclusion that the excluded evidence, even if admitted, would not change the result which the trial court reached, is based solely on this theory that the trial court was not going to believe anything appellant said. If that is true, nothing could more clearly demonstrate that appellant did not have a fair trial, nor could it be more evident that the error was highly prejudicial.

On the question of waiver of conditions precedent, appellee presents the following points, which we will consider in the order given by appellee:

First, appellee claims that the finding of waiver is supported by appellant's acceptance and retention of the \$3,000.00. This presupposes that the payment was made on the particular contract in suit. The draft by which the payment was made, however, shows on its face that it was not on this particular contract, but on a modification thereof or on a sub-

stituted contract, made several weeks later. Appellee neglects to explain this.

As second and third points appellee says by Exhibts 11 and 12, appellant acknowledged the contract. Appellant has never denied that an agreement or contract was made between the parties, but he does contend the contract in suit does not represent that agreement. The terms and conditions of that subsequent agreement which was finally reached are not before the court in this case, and it is impossible to tell what they were to the extent that any liability could be predicated thereon. We think it is obvious that appellant's letters referred to the agreement the parties did make, but even if it be construed that he was referring to the contract in suit, it was nothing more or less than an attempt to settle a dispute by friendly means. Considering all the circumstances under which those letters were written, appellant's reference to the contract is far short of any admission or recognition of the actual validity of the contract. We might call attention to appellant's statement on page 158 of the Record that he thought the contract had been cancelled, but appellee was insisting on performance of it. Merely because appellant referred to a contract which was in dispute certainly does not constitute any admission of its validity, particularly where the purpose of the letter was to effect a settlement of that dispute. Certainly it does not constitute evidence to support a waiver of any conditions.

II

Weight and Grade

Appellee commences its argument on this subject on page 25 of its brief. It undertakes what it calls a review of the evidence. It argues that appellant's testimony that he did not have any O left hip steers at the time the contract was signed is untrue. The argument is obviously based on its theory that the paint mark can be called a brand, which we think is erroneous.

The next point is that appellant said in his letter, Exhibit 2, that the steers were of good quality. As we have said, this letter did not refer to the Wyoming steers, but to the Peterson steers at Jackson, Montana. Likewise, appellant's testimony which appellant quotes on pages 28-29 of its brief referred to the Peterson steers, as is obvious from his testimony on page 111 of the record.

The real point in issue, however, on this subject of quality, is completely ignored by appellee. No matter what representations or statements appellant may have made about the quality of any steers he had or expected to get in October or November, 1946, their quality ten months later would depend on many factors, and there is no evidence of such factors in this case. Moreover, the contract itself did not require delivery of any particular grade, and actually contemplated and provided for different grades. Appellee does not discuss the real issue, nor does it answer our charge that the trial court, by

its findings, undertook to, and did, write something into the contract above and beyond what the parties provided when it said the steers had to be of good quality.

Appellee attempts to distinguish the case of *Mason v. Ruffin*, 130 So. 843, by saying that case referred to unidentified steers. Appellee therefor relies entirely on its theory that it positively identified the Wyoming steers as the subject of the contract. If this premise is unsound, as we insist it is, the case cannot then be distinguished from the cited case.

On the subject of weight, we will briefly examine the points which appellee says supports the trial court's findings thereon. It says, first, that appellant himself established the minimum weight at about 900 pounds. It then says it is proved by other evidence that he underestimated. All that is necessary is to show just what steers appellant was testifying about when he gave his estimate of this figure. The record shows, pages 112-114. They were the Peterson steers, and as they were never obtained, we cannot see where testimony as to their estimated weight has any force or value in proving what weight steers he would have to deliver under this contract. The most this testimony would tend to prove is that appellant could have delivered steers which averaged 900 pounds, but it does not support any claim that they had to weigh that figure, or any other figure. It might tend to show that 900 pound steers would

be acceptable under the contract, but it does not show that the contract required 900 pound steers.

The next point urged is that Robertson testified the steers he was feeding for appellant would, under normal feeding conditions, have weighed from 925 to 1000 pounds by August or September of 1947. As appellee points out, the steers Robertson was feeding were the so-called Wyoming steers. The record shows that they actually turned out to weigh from 845 pounds (ninth item, Exhibit 5—Record, p. 67) to over 1285 pounds (average of 7 steers on Exhibit 6—Record, p. 68). Appellee has calculated the average of all of these same steers as being 1046 pounds. As we have said, the use of an average of a herd showing such a wide variation in individual animals would be unjust and unreasonable as a means of showing what the contract required. Appellee does not deny this, nor does it point out wherein said average figure would support a finding of 950 pounds.

Appellee's arguments on weight are therefor unsound. It's first point that appellant fixed the weight at 900 pounds proves nothing, because appellant was testifying about an entirely different herd. The second point, Robertson's testimony, can be judged by its accuracy as shown by comparing his estimates with the actual figures. On the third point, the Wyoming cattle were not the contract cattle, and as to them, the use of an average is patently out of reason because of wide variation.

III

Abandonment and Substitution

Appellee attacks this issue first by referring to the allegations of the amended answer. We think the issue is properly raised. Paragraph V of the pleading alleges that because of the failure to pay the down payment called for by the contract, there was a failure of consideration, and the said contract was rescinded and abandoned. Paragraph VI alleges that the parties thereafter entered into a subsequent parol agreement. This is, to our view, both consistent and proper, and in accord with what the facts show was the actual case.

The evidence shows that the \$3,000 down payment was not made when the contract was signed, and when it was paid, it was paid on a new and different undertaking. We do not maintain that the failure to pay the \$3,000 at or near the time the original contract was signed was the only reason why the original contract was rescinded and abandoned by the parties, but it was one of the reasons. Appellee gives no explanation of why it was not paid upon appellant's request as made in Exhibit 2, nor does it explain why the draft showed on its face that a different deal had been made in the meantime.

Appellee seems to question our use of the word "rescind," and says we have not made out a case of rescission, implying that rescission implies or requires notice of rescission and restoration of status quo, and says that rescission is a method whereby one

party to a contract may, under certain circumstances, relieve himself of his obligation. Our use and understanding of the term is as is stated in 12 Am. Jur. 1011, where it is said:

“Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. However, to have the effect of discharging a contract, an agreement of recission must be a valid agreement. Two minds are required to change the terms and conditions of a contract after it is executed . . . If, however, the parties agree to rescind the contract and each one gives up the provisions for his benefit, the mutual assent is complete and the parties are then competent to make any new contract that may suit them.”

Appellee's next point is that the trial court simply did not believe appellant's testimony. We have discussed the right of the trial court in that respect, and need say no more about it here.

Appellee next seeks to make something out of the claim that there are inconsistencies between the original answer and the amended answer in this case. The very purpose of making amendments to pleadings is to have them conform to what the pleader expects the facts will show on the proof in the case. Under certain circumstances, statements in former pleadings are sometimes admissible as admissions, but we believe the rule is universal that an abandoned or superseded pleading is, to all intents and pur-

poses, out of the case and any inconsistencies or admissions therein can be taken advantage only by placing the former pleading back in the case by introducing it in evidence.

Shipley v. Reasoner, (Iowa) 54 N. W. 470.

Brisco v. Met. Ry. Co. (Mo.) 120 S. W. 1162

Woodsworth v. Thompson, (Neb.) 62 N. W. 450

The original answer was not introduced in evidence, and is not part of the record. We feel it unnecessary to devote any time to arguing about any inconsistencies therein. If there are any such inconsistencies, as claimed by appellee, they are caused by the ineptitude of appellant's counsel, and appellant should not be prejudiced thereby. The reason for requiring former pleadings to be introduced in evidence before any claimed admissions or inaccuracies therein may be taken advantage of, is of course that any admissions or former statements are open to explanation, and unless they are placed in evidence, there is no way to offer such explanation.

Appellee says the record provides the complete answer to appellant's contention that his testimony of abandonment was uncontradicted, based on four points. Taking the first point, appellee says when appellant attempted to return the \$3,000, it was accompanied by a letter acknowledging it was first paid to appellant **under the contract**. The letter referred to is Exhibit 8. We answer this by asking this court to look at the Exhibit. It says **purported** contract. It is to be remembered that at the time

this letter was written, appellee was claiming it had a contract for 300 steers, and had already demanded delivery of that number. The letter obviously referred to the claim appellee was then asserting—its **purported** contract.

We have already discussed appellee's next two points, which have to do with Exhibits 11 and 12. As we said, there was a dispute. Appellant is only a cattle rancher, and could hardly be expected to use the same terms or language of a lawyer. He did not qualify his language by the use of the word "purported" or such similar qualification. Under the circumstances, thinking the contract had been cancelled but finding appellee insisting on it, the meaning of his language is apparent, and he was certainly not admitting the **validity** of the contract.

Appellee's remaining point is that appellee, by repeated demands for performance, negatived any inference that appellee considered the contract as abandoned. Appellee's demands were for the delivery of 300 steers, and nothing else would do, although appellee well knew it had no real right to that number. We are unable to see where appellee's improper demands prove anything about the contract, or that such demands in any way negative appellant's assertion that his testimony was uncontradicted in these particulars. There was one clear way by which appellant's testimony about abandonment of the original contract could have been contradicted, and only one way—by putting Louis Salerno on the wit-

ness stand, which appellee did not do. The presumption is that appellant's testimony was true. The inference why appellee did not have Salerno contradict it is obvious.

Commencing on page 40 of its brief, appellee discusses appellant's argument that when the contract was shown by the evidence to have been materially modified or superseded, appellee, having declared on the contract as originally written, cannot recover. Appellee's argument is that appellant's contention is unsound because it was from evidence adduced by appellant that the facts were disclosed. Appellee well knew, as it was advised by the amended answer, that the original contract had been changed. It sought to conceal this, however, but it did not entirely succeed. The full terms and conditions of the subsequent agreement, however, are not before the court, and in such state of the evidence, we do not think the trial court could rightly predicate any liability on the subsequent agreement. Even after the facts had been disclosed, at least enough to show that there was a subsequent change, appellee did not change its position, but remained standing on the original contract. We take it the door was wide open for appellee to go ahead after the change had been shown and prove what its rights were under the subsequent agreement. Instead, it sought and continued to seek to recover on a contract which the parties had mutually repudiated. The rule for which ap-

pellee contends can hardly apply in such circumstances.

IV

Right to Impeach Salerno

As may be seen from appellee's entire brief, it largely rests its case on the assumption that it has positively identified the subject matter of the contract. It is apparent from the manner in which this contract was negotiated that Salerno and appellant alone knew the true facts, and it was for this specific purpose that appellant called Salerno—to get at the facts.

The identity of the subject matter was one of the vital issues in this case. There were recitals in the contract which bore on that issue, but they were not true statements. Salerno knew they could not possibly be correct, and as he was the person who had them put there, his purpose in putting them there could be shown. He had previously testified on the taking of his deposition. We invite the court's attention to his testimony, commencing on page 127 of the record. He began to evade the questions, and knowing what he had said on his pre-trial deposition, appellant sought to use the same by way of impeachment to show what he had in mind when he put these recitals in the contract.

Appellant was not, as stated by appellee, trying to discredit the witness and then get the facts from a discredited witness. It had at least some of the facts in his deposition, and was trying to use the de-

position to see that he told the truth about matters which were known to him alone. The trial court's ruling foreclosed appellant from pursuing the entire inquiry.

Under the rules, we think appellant was entitled to have these facts disclosed, and the trial court's ruling was accordingly prejudicial error. We would refer the court to our prior brief on the whole subject.

V

Appellee makes a serious misstatement on page 49 of its brief. It says, "However, good quality steers were appropriated to the contract as found by the trial court and supported by the evidence." We find no such finding of appropriation by the trial court. Even in its memorandum decision, the trial court said, referring to the Wyoming steers, "However, title to them had not passed, they were not legally dedicated to the contract, and the defendant was free to substitute other steers of good quality."

Appellee's argument on this issue of damages continues on the theory that the Wyoming steers were the contract steers. We have discussed this, and will not repeat our contentions.

Appellee then goes on to claim that the same ratio of damages at $7\frac{1}{2}$ cents per pound would hold good under the contract formula fixing the purchase price, regardless of grade. This might or might not be true, as will be seen by reference to the formula. It would depend entirely on the difference between

the buyer's market price per pound between A grade and the actual grade of the steers. There is absolutely nothing in the record one way or another to show what the buyer's market price at the time of delivery was on any grade. We cannot compare the contract prices with prices wholly within appellee's knowledge on something which appellee offered no evidence. Appellee says that the spread between contract price and market price for low grade steers would be the same as for higher grades. Where is there any evidence to sustain such a statement? If we were to concede that the contract required all the steers to be of A grade only, there is some evidence which would sustain the 7½ cent figure, but the contract does not so require. There is no evidence as to the difference on other grades, so no finding to that effect can be sustained.

In discussing the offers made by appellant, appellee, as appears on pages 51 and 52 of its brief, refers only to the offers made by appellant to turn over the Wyoming steers to settle the dispute between the parties. We have never contended that such offers were sufficient, and our brief so shows. Appellee again resorts to using only part of the facts. It says nothing about the real offer to perform. In his letter of August 22, 1947, Exhibit 11, appellant, after offering the Wyoming steers at a higher figure than the contract price, said, "if you cannot use them at that I will put in other cattle by First of Oct. and get rid of these." It is perhaps necessary to consider

this in relation to appellant's testimony about his conversation with Salerno, which took place the last part of August or first part of September, 1947, not as appellee says, the last part of September. (Record, pages 157-158). Appellant testified that he offered to go to Denver and buy steers and sell them to appellee for 17½ cents, the contract price. Appellee says Salerno denied this, but we do not think his testimony can be so construed. He did deny he received any offers other than the Wyoming steers at more than the contract price, but at the time he testified, appellant had not as yet given any testimony about his offer to go to Denver and get other steers on the market. Salerno may not have regarded this as an offer, but he did not thereafter go on the stand and deny what we claim is appellant's offer to perform.

To our mind, Salerno's so-called denial should not have been admitted in evidence at the time he testified. He was being cross-examined on matters wholly outside the scope of his direct examination, and he was allowed to answer over proper objections.

In any event, we think the record shows appellant did offer to perform, both by letter and orally to Salerno.

VI

Performance by Appellee

The contract called for a \$3,000 down payment. Appellee admits that this payment was not made at or near the time the contract was signed, the recital

in the contract to the contrary notwithstanding. Appellee makes no explanation of the three important facts which we said should be considered in determining whether or not appellee performed under the contract. These things, which appellee so pointedly ignores, are: (1) Why did appellee delay in making the payment for several weeks, at a time when the seasonal run or market for feeder steers was in progress, knowing that appellant was to purchase steers for the contract on that market?

(2) Why did Salerno enter into negotiations with appellant after the contract was signed, which resulted in a material change in the deal?

(3) Why did Salerno have the \$3,000 draft show on its face that it was for a different number of steers than the number called for on the original contract?

We have herein and in our prior brief discussed the implications arising from these matters, but appellee ignores them and makes no answer to these questions.

Appellee's entire argument that it performed the contract is based on the retention of the proceeds of the draft and on the claim that appellant was recognizing the contract as valid.

The record shows what the draft was given for. It was not on the contract as originally written. Not enough of the subsequent dealings between appellant and Salerno are shown to tell just what they agreed upon, but, as we stated in our prior brief, appellant testified directly that he accepted the draft on an

agreement to try to get steers during the winter. No doubt he was very negligent in not returning the money as soon as he found himself unable to get the steers during the winter. Under such circumstances, he would be liable for interest until he returned the money, or at least offered to return it. Incidentally, the trial court charged him with interest on this \$3,000.00 even after the date he returned it, which, although a minor matter, was erroneous.

So far as appellee's argument is concerned, we say that it ignores the vital points which must be taken into consideration. As to the things which it claims supports its argument, we have shown that Exhibit 8 refers only to a "purported" contract. We have discussed appellee's arguments pertaining to Exhibits 11 and 12.

VII

Denial of Appellant's Motion to Dismiss

We agree that appellee has correctly stated that the issues raised by the motion go to the sufficiency of appellee's evidence to make out a prima facie case of recovery. We have discussed our interpretation of the evidence. We think the facts which we pointed out and which appellee has failed to discuss are the things which show wherein appellee failed to make a prima facie case.

VIII

Fairness of the Trial

We are astounded at appellee's attempt to prejudice this court by charging that we have attempted to reflect on the judicial integrity of Judge Healy.

We have the greatest respect for Judge Healy and for his judicial attainments. We know that Judge Healy, like all other judges, is a human being, and, like other human beings, may commit error. Judge Healy, we think, would be the first to admit that. The very purpose of appellate courts is to correct the errors which so often can and do creep into trials.

We think we have but followed the practice used by all lawyers on appeals in asserting that appellant did not get a fair trial. Particularly is this true where the exclusion of evidence is the basis of the errors charged. When material, competent evidence, properly admissible under the rules of trial practice, is excluded, a fair trial does not result, and it certainly is no reflection on the judicial integrity of the trial judge to say so on appeal.

We would reverse the order in which appellee states our contentions as to why we did not get a fair trial. Our position is this—the trial court excluded evidence which should have been admitted, which led to the court's adopting a wrong theory of the case, based on only part of the facts. In turn, limited as it was, the testimony of the appellant did not appear credible to the court, and the court took a somewhat arbitrary attitude and rejected it. We

feel that if all the facts were before the court, it would throw an entirely different light on the case, and appellant's testimony would appear far more worthy of belief.

We think the errors in this case arose because of appellee's rather successful concealment of the true facts. We feel that on a new trial, under proper instructions from this court, all the competent, material evidence will be properly received and weighed, and that the errors which we have complained of will not again occur.

Respectfully submitted,
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